

No. 11295

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG 28 1943

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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No. 18303

Feb. 13, 1946

Viol.: United States Code, Title 18, Section 451 (1),
452 and 454

In the District Court of the United States in and for the
Southern District of California
Central Division

February, 1946, Term

In the Name and By the Authority of the United States
of America, the Grand Jury for the Southern District of
California, at Los Angeles, presents on oath in open court:

That

FRANCIS P. O'LEARY

hereinafter called the defendant, heretofore, to wit: on
or about December 9, 1945, on board the steamship "Ar-
thur R. Lewis", a vessel belonging to the United States
and within the admiralty and maritime jurisdiction of the
United States and out of the jurisdiction of any par-
ticular state, towit: in waters of the Pacific Ocean at or
near Manus Island, did knowingly, wilfully, unlawfully
and feloniously and with malice aforethought kill and
murder a human being, to wit: one Austin Stuart Fithian,
by the following means, to wit: by shooting the said
Austin Stuart Fithian with a pistol, with intent to kill
the said Austin Stuart Fithian, thereby causing his death:

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR

United States Attorney [2]

A true bill,

CLYDE R. BENDICK

Foreman

[Endorsed]: Filed Feb. 13, 1946. [3]

[Minutes: Friday, February 15, 1946]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for arraignment and plea of defendant Francis P. O'Leary; R. H. Kinnison, Assistant U. S. Attorney, appearing as counsel for the Government; C. R. Samuelson and Pat A. McCormick, Esq., appearing as counsel for the said defendant, who is present in custody:

The defendant states his true name is as set forth in the Indictment, a copy of which is given to his attorneys.

Defendant's attorneys waive reading of the Indictment and the defendant pleads not guilty.

It is ordered that the cause be, and it hereby is set for trial on March 19, 1946, at 9:30 A. M., and the Court admonishes the witnesses to return at that time.

The Court denies motion of defendant's attorneys for an order fixing bail. [4]

In the District Court of the United States

Southern District of California

Central Division

No. 18303-Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCIS P. O'LEARY,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

Given: Leon R. Yankwich, Judge [5]

General Criminal (1)

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the judge in these instructions. It would be a violation of your duty for you to attempt to

determine the law or to base a verdict upon any other view of the law than that given you by the court,—a wrong for which the parties would have no remedy because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do. [6]

Criminal General

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. The offense with which the defendant is charged is: Murder.

In this connection, you are instructed that the indictment on file herein is a mere charge or accusation against the defendant and is not any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of [7] witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence. And the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial; and a witness may also be impeached by proof that he has been convicted of a felony.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but wilfully and with the design to deceive, must treat all

of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth. [8]

General Criminal

A defendant in a criminal case is not required to take the stand and testify. When he chooses this course of action, no inference adverse to him may be drawn from this fact by the Jury.

The defendant having availed himself of this privilege, you are to draw no inference of guilt against him from his failure to take the stand and testify. [9]

General Criminal—Reasonable Doubt

You are instructed that the law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law and binding on you in this case.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all

the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, [10] leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses, as given you in another part of the instructions, are to be applied to his testimony alike with that of all other witnesses. [11]

Circumstantial Evidence

There are two kinds of evidence by which the Government may sustain charges laid in an indictment—the one is known as direct and positive; the other as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the case. Evidence is said to be indirect or circumstantial, on the other hand, when the witnesses testified to matters having only an indirect or circumstantial relationship to the issues in the case. [12]

Circumstantial Evidence

While you may show what a man does by direct evidence of eye witnesses, the only way you can show what he intends and believes or what his plans or purposes are, or were, is by circumstantial evidence.

The law requires that all the circumstances necessary to show guilt must, themselves, be shown by evidence beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with a defendant's guilt and that they must all be inconsistent with any reasonable theory or hypothesis except that of guilt.

If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty. If it fails to do so, in any one of such particulars, your verdict should be not guilty. [13]

Murder Definition

The indictment charges the defendant with having murdered Austin Stuart Fithian. The Statutes of the United States define the crime murder as follows:

"Murder: first degree; second degree. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree." (18 U. S. C. A. 452.) [14]

Malice

In connection with the crime of murder, there must exist ~~what the law terms~~ "malice".

~~"Malice"~~ simply means this:

"Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury."

Or, in other words, it can be defined as follows:

"To constitute murder, there must be malice, and malice is an intent to do bodily harm, a formed design, and deliberate intent to kill. It does not necessarily imply any ill will, spite, or hatred towards the individual killed,

but includes a case of a depraved, wicked, and malicious mind, and a will deliberately bent on murder, or doing some great bodily harm. It implies premeditation, which is a period of time for prior consideration, but as to the duration of that period the limit cannot be arbitrarily fixed. The time in which to form a design varies as the minds and temperaments of men differ, according to the circumstances in which they may be placed, and an interval of time between the forming of the intent to kill and the execution of such intent sufficiently long for the defendant to be fully conscious of what he intended, is sufficient to support a conviction for murder. Malice, as I have said before, may be inferred from the facts in the case. It may be drawn as an inference [15] from all the evidence that is produced when taken into consideration as a whole. No fact, no matter how small, nor circumstance, no matter how trivial, which bears upon the question of malice, should escape careful consideration by the jury," for instance, the time and place of the deed, and the preparation of the defendant, as well as the use of a deadly weapon; and it is only as a conclusion from these facts and circumstances, that malice, if at all, is to be inferred." [16]

Jurisdiction

The defendant is charged with having, on or about December 9, 1945, on board the Steamship "Arthur R. Lewis", a vessel belonging to the United States and within the admiralty and maritime jurisdiction and out of the jurisdiction of any particular state, namely, in the waters of the Pacific Ocean at or near Manus Island, unlawfully killed and murdered Austin Stuart Fithian by

shooting the said Fithian with a pistol and with intent to kill him, thereby causing Fithian's death.

Under the laws of the United States, such an offense may be prosecuted in the Federal courts, that is, in this particular court.

The Government and the defense have dispensed with, by entering into a stipulation, the taking of certain evidence that might have otherwise been required. This stipulation refers to the jurisdiction of this court to try this offense. Such a stipulation shall be considered by you the same as if witnesses had actually taken the stand and testified to the facts therein agreed to; for a stipulation is, for all practical purposes, an agreement voluntarily entered into by both parties to a proceeding. If you wish, the stipulation may be read by you, or may be taken with you during your deliberation.

Briefly stated, the stipulation agrees that this court has jurisdiction to try this offense, if one was in fact committed, and agrees that on December 9, 1945, the Steamship "Arthur R. Lewis" was a vessel belonging to the United States. It further agrees that said vessel was at said time in the waters of the Pacific Ocean near Manus Island, within the admiralty and maritime jurisdiction of the United States, and that said offense is subject to prosecution in this court.

The stipulation also repeats the defendant's previous plea, namely, of not guilty to the charge contained in this indictment. [17]

Motive

Frequently in a prosecution for a crime evidence is offered to establish a motive or a reason why the accused may have committed the offense.

Motive means the purpose or that which incites or causes a person to do what he did, or that which may have prompted him to act.

The absence of evidence suggesting a motive is a circumstance in favor of the accused, to be given such weight as you the jury deem proper.

It is, however, also true, that frequently the government is unable to offer any evidence on the question of motive, such evidence may not exist, or if it did exist, may only be known to the deceased and the accused.

It is not necessary to show a motive for the commission of the crime so long as the evidence shows that the killing was intentional and without justifiable excuse, and that the accused was the perpetrator.

Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory. Its presence is never more than a circumstance to be considered by the jury and its absence is equally a circumstance in favor of the accused, to be given such weight as the jury deem proper. Thus, in this case, the fact that no motive for the commission of the crime charged has been brought home to the defendant, may be considered by you for what value you may

decide to give it, along with all the other circumstances and evidence in the case. [18]

Motive

Frequently in a prosecution for a crime evidence is offered to establish a motive or a reason why the accused may have committed the offense.

Motive means the purpose or that which incites or causes a person to do what he did, or that which may have prompted him to act.

The absence of evidence suggesting a motive is a circumstance in favor of the accused, to be given such weight as you the jury deem proper.

It is, however, also true, that frequently the government is unable to offer any evidence on the question of motive, such evidence may not exist, or if it did exist, may only be known to the deceased and the accused.

It is not necessary to show a motive for the commission of the crime so long as the evidence shows that the killing was intentional and without justifiable excuse, and that the accused was the perpetrator.

So if you believe from the evidence in this case, beyond a reasonable doubt, that the perpetration of the offense as alleged has been brought home to the defendant O'Leary, the motive for its commission is unimportant. Motive may be shown by positive evidence or gleaned from the facts and surrounding of the act. Proof of motive is never indispensable in a criminal case. [19]

Intoxication

Voluntary intoxication not amounting to settled insanity such as delirium tremens is no defense, but it is admissible to determine whether the defendant had formed the necessary or deliberate intent such as premeditation in a murder case.

In other words, drunkenness is not an excuse for a crime. But in all cases where the law requires that there be a specific intent to do a particular thing, as in the case of murder in the first degree where there must be an actual intent to kill, it does become necessary for you to inquire as to the state of mind with which the defendant acts, and his drunkenness or sobriety is a matter for consideration in making any inquiry; you will consider the drunkenness, if it existed, for the purpose of ascertaining whether or not he was able to form an intent and deliberate and premeditate over it. The degree of the offense depends upon the question whether the killing was willful, deliberate, and premeditated, and upon that question it is proper for you to consider evidence of drunkenness in order to determine whether the defendant's mind was capable of that deliberation and premeditation which is necessary to amount to murder in the first degree.

If you find that this defendant O'Leary at the time of striking the fatal blows, if he struck them, was intoxicated to such an extent that he could not form the purpose or intent to kill and that he was so intoxicated that he could not deliberate and premeditate over the intent to kill, then he would not be guilty of murder in the first degree.

A drinking man may be able to form an intent to kill; he may be able to deliberate and premeditate, even though his mind may be inflamed to some extent by liquor * * * if he still has the ability to form an intent to kill and premeditate and deliberate upon it, then the offense is murder in the first degree, if you find, of course, that he actually did have the intent to kill and did deliberate and premeditate upon it. [20]

Several Verdicts

You are advised that you may return one of several verdicts with respect to the crime charged against the defendant, in the indictment, namely: (1) not guilty; (2) guilty of first degree murder, (3) guilty of second degree murder, or (4) and (5) guilty of manslaughter, voluntary or involuntary. If you find the defendant is guilty of first degree murder, then punishment can be fixed by your verdict, for the laws of the United States with respect to a verdict of first degree murder permit you as jurors, to qualify that verdict by adding thereto the provision, without capital punishment". In this case the government is not requesting capital punishment.

If you determine that the defendant is guilty of murder in the first degree and you do agree that that verdict shall be qualified with the addition or recommendation "without capital punishment", then I instruct you that the law provides that the defendant will not suffer the death penalty. As to all other matters, regarding the

punishment to be meted out to the defendant, should you find him guilty of the crime as charged in the indictment, you are instructed that this is not to enter into your deliberations nor should it be considered a concern of the jury. Such punishment is solely within the province of the court and should neither be discussed nor dwelt upon by you in your capacity as jurors in this cause. [21]

Other Offenses Included

As I have heretofore explained to you, you may find the defendant either not guilty, or you may find him guilty of murder in the first degree. ~~Should you find him guilty of murder in the first degree, that verdict may also be qualified by adding to your verdict the recommendation "without capital punishment", in which event the defendant will be sentenced to imprisonment for life.~~

The crime of murder also includes the lesser offense, namely, murder in the second degree. This refers to unlawful killings committed without malice aforethought or without premeditation, and includes all other murders excepting murders of the first degree.

You may also find the defendant guilty of the crime of manslaughter. Manslaughter is divided into two classifications, voluntary and involuntary. The statutes of the United States define manslaughter as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” [22]

Criminal General

You are instructed that the Government and the defendant are entitled to the individual opinion of each juror on the issue of fact in this case. It is the duty of each of you to consider and weigh all the evidence in the case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced that you are right, it will be your duty to stand by your decision. But each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom; this it is his duty to do. If, after such a full and fair discussion with them, any juror is still satisfied that his decision is right, he should say so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision, and render his verdict according to such final decision.

[Title of District Court and Cause.]

REQUESTED JURY INSTRUCTIONS REFUSED
BY THE COURT

Refused:, Judge [24]

* * * * *

REQUESTED INSTRUCTIONS OF DEFENDANT,
FRANCIS P. O'LEARY [25]

Comes now defendant in the above-entitled action and
requests the Court to instruct the jury as follows: [26]

Instruction No. 1

You are instructed to find the defendant not guilty.

Requested by defendant.

Given:

Refused:

[Endorsed]: Filed Mar. 21, 1946. [27]

[Minutes: Thursday March 21, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

This cause coming on for further jury trial of the defendant Francis P. O'Leary; Norman W. Neukom, Esq., Assistant U. S. Attorney, appearing for the Government; C. R. Samuelson and Pat A. McCormick, Esq., appearing for the defendant; the defendant is present and the jury is absent:

The Court makes a statement re instructions. Now, at 10:30 A. M., the jury is brought into the Court Room; appearances as before. The Court instructs the jury on the law of this case, and at the conclusion thereof Attorney McCormick states he wishes to object to a certain instruction. Instead of having the jury withdraw from the Court Room, the objections of the defendant are held in the Court Room, but out of hearing of the jury. Bailiffs Glen Fuller and F. W. Mefferd are sworn to act as officers to care for the jury and at 11:06 A. M. the jury retires to deliberate upon its verdict.

At 12:07 P. M. the jury, through bailiff Fuller, requests the exhibits and the instructions given by the Court, and same are furnished to the jury.

At 12:37 P. M. the jury is ordered taken to lunch in charge of the officers so sworn.

At 3:40 P. M. Court reconvenes herein; the counsel for the Government and defendant are present; the de-

fendant is present, and the jury is present in the box. In response to the Court's inquiry, the foreman states that the jury has agreed upon a verdict, whereupon the verdict is presented and read, the verdict being as follows:

* * * * * [28]

The jury is polled and each juror states that the verdict as presented and read is his or her verdict. The verdict is ordered filed and entered. The jurors are excused until further notice and leave the Court Room.

It is ordered that this cause be, and it hereby is, referred to the Probation Officer for investigation and report and continued to April 2, 1946, at 2 P. M., for hearing and sentence. [29]

[Title of District Court and Cause.]

We, the Jury in the above-entitled cause, find the defendant, Francis P. O'Leary, guilty of voluntary manslaughter.

Dated: March 21, 1946.

WM. MIDDLETON

Foreman of the Jury.

[Endorsed]: Filed Mar. 21, 1946. [30]

[Minutes: Tuesday, April 2, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

This cause coming on for hearing on report of the Probation Officer and sentence of the defendant Francis P. O'Leary after verdict of the jury of guilty of voluntary manslaughter, and for hearing on oral motion of defendant for new trial; Norman Neukom, Esq., Assistant U. S. Attorney, appearing for the Government; C. H. Samuelson and Pat A. McCormick, Esqs., appearing for the defendant; the defendant being present in custody:

Attorney McCormick argues in support of oral motion for new trial. Attorney Neukom argues in opposition. The Court makes a statement and enters order denying motion. Attorney McCormick makes a statement that there is no legal cause why judgment should not now be pronounced. The defendant makes a statement. The Court pronounces judgment against the defendant as follows:

* * * * * [31]

District Court of the United States

Southern District of California

Central Division

No. 18,303

Criminal Indictment in One Count for Violation of
U. S. C., Title 18, Secs. 451(1), 452, 454

UNITED STATES

v.

FRANCIS P. O'LEARY

JUDGMENT AND COMMITMENT

On this 2nd day of April, 1946, came the United States Attorney, and the defendant Francis P. O'Leary appearing in proper person, and by counsel, C. R. Samuelson, Esq., and Pat A. McCormick, Esq., and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: the crime of voluntary manslaughter, in that defendant on or about December 9, 1945, on board the steamship "Arthur R. Lewis", a vessel belonging to the United States, in waters of the Pacific Ocean at or near Manus Island, did knowingly, wilfully, unlawfully and feloniously kill one Austin Stuart Fithian by shooting said Fithian with a pistol, as more particularly appears by said Indictment, and the defendant having been now asked whether he has anything to say why

judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Six years in an institution of the penitentiary type.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

LEON R. YANKWICH

United States District Judge

A True Copy. Certified this 2nd day of April, 1946. Edmund L. Smith, Clerk; by John A. Childress, Deputy Clerk.

[Endorsed]: Filed Apr. 2, 1946. [32]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Francis P. O'Leary, Los Angeles County Jail, Los Angeles, California.

Name and address of appellant's attorney: Pat A. McCormick, Suite 907 I. N. Van Nuys Building, 210 West 7th Street, Los Angeles 14, California.

Offense: Indictment charged murder; conviction of lesser offense included therein, namely, voluntary manslaughter.

Judgment: Dated April 2, 1946, and entered April 2, 1946, recites the conviction of defendant of the offense of voluntary manslaughter and the sentence mentioned therein is that defendant be committed to the custody of the Attorney General, or his Representative, for imprisonment for the period of six (6) years in an institution of the penitentiary type.

Name of institution where now confined, if not on bail: County Jail of County of Los Angeles, at Los Angeles, [33] California.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: April 9, 1946.

FRANCIS P. O'LEARY

Appellant

By PAT A. McCORMICK

Attorney for Appellant [34]

Received copy of the within Notice of Appeal this 10th day of April, 1946. Charles H. Carr, U. S. Atty., RM, Attorney for U. S.

[Endorsed]: Filed Apr. 9, 1946. [35]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Comes now, the defendant and appellant, Francis P. O'Leary, and pursuant to the Rules in such case made and provided, states that the points on which he intends to rely upon this appeal to the United States Circuit Court of Appeals are as follows:

1. The District Court erred in denying the motion of defendant made at the close of the trial, that the Court instruct the jury to render a verdict of acquittal of the defendant.

2. That the District Court erred in refusing to give the requested written instruction which instructed the jury to acquit the defendant.

3. That the evidence was insufficient to sustain the finding of the jury that defendant was guilty of the offense of voluntary manslaughter. [36]

4. That the evidence was insufficient to justify or sustain the judgment and sentence of the District Court from which this appeal is taken.

5. That the Court erred in denying defendant's motion for a new trial.

Dated: Los Angeles, California, May 29, 1946.

A. I. McCORMICK and
PAT A. McCORMICK

By A. L. McCormick
Attorneys for Appellant [37]

Received copy of the within this 29 day of May, 1946.
U. S. Atty., by N. W. Neukom, Asst. U. S. Atty.

[Endorsed]: Filed May 29, 1946. [38]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO PREPARE
RECORD ON APPEAL AND TO FILE THE
SAME AND DOCKET THE PROCEEDINGS IN
THE UNITED STATES CIRCUIT COURT OF
APPEALS

It Is Hereby Stipulated by and between the United States of America and Francis P. O'Leary, Defendant and Appellant in the above entitled proceedings, that the time within which said appellant may serve and file his Designation of the portions of the record, proceedings and evidence to be contained in the record on appeal may be extended up to and including the 29th day of May, 1946.

It Is Further Stipulated that the time within which the record on appeal shall be filed with the United States Circuit Court of Appeals for the Ninth Circuit may be extended up to and including the 20th day of June, 1946.

It Is Further Stipulated that an order of Court [42] may be made and entered in the above entitled Court to this effect.

Dated: May 9th, 1946.

UNITED STATES OF AMERICA
By CHAS. CARR

U. S. Attorney

NORMAN W. NEUKOM

Assistant U. S. Attorney

PAT A. McCORMICK

Attorney for Defendant and Appellant

[Endorsed]: Filed May 13, 1946. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE RECORD ON APPEAL AND TO FILE THE SAME AND DOCKET THE PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS

In accordance with the written stipulation of the parties of date May 9th, 1946, on file herein, and good cause appearing therefor,

It Is Hereby Ordered that the time within which Appellant may serve and file his Designation of the portions of the record, proceedings and evidence to be contained in the record on appeal is hereby extended up to and including the 29th day of May, 1946.

It Is Further Ordered that the time within which the record on appeal shall be filed with the United States Circuit Court of Appeals, for the Ninth Circuit, is hereby extended up to and including the 20th day of June, 1946.

Dated: This 13th day of May, 1946.

LEON R. YANKWICH

U. S. District Judge

[Endorsed]: Filed May 13, 1946. [44]

[Title of District Court and Cause.]

STIPULATION AND ORDER CONCERNING
TRANSFER OF ORIGINAL EXHIBITS TO
CIRCUIT COURT OF APPEALS.

It Is Hereby Stipulated by and between the Attorneys for the United States of America, Plaintiff and Respondent in the above entitled proceeding, and A. I. McCormick and Pat A. McCormick, as attorneys for the Defendant and Appellant above named, the originals of each and all of the exhibits introduced in evidence at the trial of the above entitled proceeding may be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies of said exhibits, and that the Clerk of the above entitled District Court may so send said original exhibits as a part of the record on appeal herein.

It Is Further Stipulated that an order of the District Court may be made and entered in conformity [45] herewith.

Dated: Los Angeles, California, June 3, 1946.

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney

Attorneys for Plaintiff and Respondent,
United States of America

A. I. McCORMICK and

PAT A. McCORMICK

By A. I. McCormick

Attorneys for Defendant and Appellant,
Francis P. O'Leary

ORDER

Upon reading and filing the above and foregoing stipulation, and the Court being of the opinion that the said original exhibits should be sent to the United States Circuit Court of Appeals, and good cause appearing therefor,

It Is Hereby Ordered that said original exhibits shall be sent by the Clerk of this Court to said Circuit Court of Appeals and that upon final termination of said appeal said exhibits shall be returned to the clerk of this Court.

Dated: Los Angeles, California, this 4th day of June, 1946.

LEON R. YANKWICH

Judge of the District Court of the United States.

[Endorsed]: Filed Jun. 4, 1946. [46]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 46 inclusive contain full, true and correct copies of Indictment; Minute Order Entered February 15, 1946; Court's Instructions to the Jury; a Portion of Defendant's Requested Instructions Refused by the Court; Minute Order Entered March 21, 1946; Verdict, Minute Order Entered April 2, 1946; Judgment and Commitment; Notice of Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Contents of Record on Appeal; Stipulation Extending Time to Prepare Record and File and Docket Appeal; Order Extending Time to Prepare Record and File and Docket Appeal; and Stipulation and Order for Transmission of Original Exhibits, which, together with Original Exhibits and Original Narrative Statement of Proceedings at the Trial, Including all of the Evidence Offered or Received with Stipulation and Order Approving same, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of June, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause.]

PROCEEDINGS AT THE TRIAL, INCLUDING
ALL OF THE EVIDENCE OFFERED OR RE-
CEIVED.

The trial commenced on the 19th day of March, 1946, at ten o'clock A. M. before the above entitled court, Honorable Leon R. Yankwich, Judge presiding.

The united States of America was represented by Norman W. Neukom, Esquire and Patrick Horgan, Esquire, Assistant United States Attorneys. Defendant was present in Court with his counsel, C. R. Samuelson, Esquire and Pat A. McCormick, Esquire. A jury of twelve persons was duly impanelled and sworn to try the cause. Opening statements to the jury were made by Mr. Neukom on behalf of the Government and by Mr. Samuelson on behalf of the defendant.

Thereupon, the following proceedings were had:

"The Court: Call your first witness."

Mr. Neukom: All right. Your Honor, at this time I would like to file a stipulation on the question of jurisdiction of this court, dispensing with the necessity of establishing certain of those facts.

The Court: All right. For the benefit of the jurors who *have* may not have had experience, I will say that when a stipulation is entered into it merely means that counsel agree that the facts stated in the stipulation are so without further proof. It merely dispenses with the necessity of proving the particular facts. Mr. Neukom has stated this is merely to the effect that this vessel was

under the jurisdiction of the United States and, therefore, this court has jurisdiction of any crime committed on it. Proceed."

The stipulation above referred to, duly signed and filed, was and is in words and figures following, to-wit:

"Title Court and Cause:

No. 18303-Cr.

STIPULATION RE JURISDICTION.

It Is Hereby Stipulated by and between Charles H. Carr, United States Attorney, James M. Carter, Ernest J. Tolin and Norman W. Neukom, Assistant United States Attorney, Attorneys for the United States, and C. R. Samuelson, Attorney for defendant, Francis P. O'Leary, and with the approval of said defendant as follows:

1. That this stipulation is in no wise to be considered as an admission upon the part of the defendant of the offense for which he has been charged in the instant indictment, or of any of the lessor offenses that might be so included, the defendant reiterating his former plea; to wit: of not guilty to said charge.

2. That in view of 18 USC, Section 451 and the relevant sections pertaining to the offense charged and so as to dispense with the necessity of the Government offering proof on the question of jurisdiction, the following is stipulated to:

3. That as of the dates of the offense charged in the [2*] herein indictment, to-wit: on or about December 9, 1945, the steamship SS "Arthur R. Lewis" was at

*Page number appearing at foot of original copy.

said time and place a vessel "belonging" to the United States, by and through its corporations; namely, The War Shipping Administration or the United States Maritime Commission.

4. It is further stipulated that if any offense was committed as charged in the indictment, that the offense charged in the instant indictment was committed aboard the steamship "Arthur R. Lewis", a vessel belonging to the United States while said vessel was in the waters of the Pacific Ocean near Manus Island on or about December 9, 1945, within admiralty and maritime jurisdiction of the United States, and said offense is subject to prosecution in the herein court.

5. It being fully understood and agreed that no issue at time of trial, or otherwise, will be raised by the defendant on the question of jurisdiction of the herein Federal Court to try the offense charged in the herein indictment.

Dated: February 27, 1946.

C. RANSOM SAMUELSON

C. R. SAMUELSON

Attorney for Defendant

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney"

[Endorsed]: Filed March 19, 1946. [3]

HARRY MAXWELL ZENTS

was then called as a witness for and on behalf of the United States to testify as to certain preliminary matters, with the understanding that he might be called later to testify as to other matters. Said witness, after being duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Neukom:

My name is Harry Maxwell Zents. I am acquainted with the defendant in this case. I was one of the officers aboard the steamship "Arthur R. Lewis" around about December of 1945. That vessel had left from Norfolk, Virginia, in the United States, about the 25th of October, 1945. It went through the Canal and ultimately came to anchor in Seadler Harbor near Manus Island in the Southwest Pacific. I was present on that vessel on the evening of December 9th when Captain Fithian was killed.

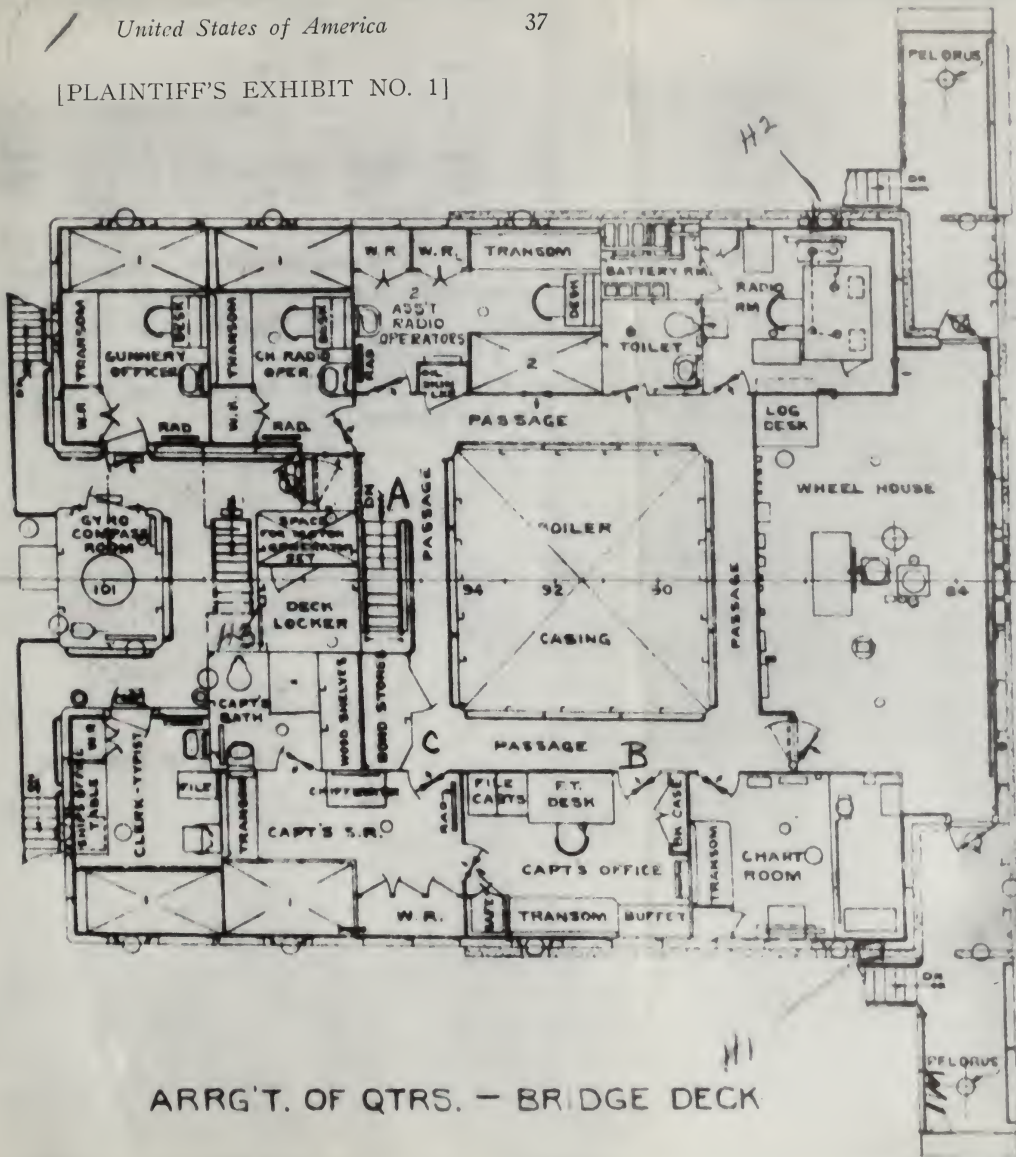
(The witness was then shown by the Assistant United States Attorney two photostatic copies of what purported to be deck plans of a vessel; the copies were marked respectively, in blue, "1" and "2" and copies were handed to counsel for defendant.) The witness thereupon continued testifying as follows:

The smaller of these two photostatic copies which you have shown me does, subject to any corrections, in my opinion substantially set forth the floor plan or deck plan

(Testimony of Harry Maxwell Zents)

of the upper deck or bridge deck. This deck plan is similar to the one on the "Arthur R. Lewis". Concerning the other of said two photostatic copies, which has been marked for identification Government's Exhibit No. 2, which you now show me and which has noted thereon "Arrangement of Quarters of the boat deck", I will state that that deck was immediately below the bridge deck of the "Arthur R. Lewis". In my opinion this is a fair representation of the boat deck floor plan of that vessel. The photostatic copy last referred to and marked for identification as Government's Exhibit No. 2 was then [4] offered and received in evidence as Government's Exhibit No. 2, and the other of said photostatic copies above referred to was then offered and received in evidence as Government's Exhibit No. 1. Said Exhibits were received without objection.

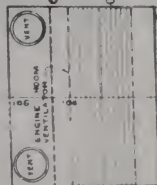
[PLAINTIFF'S EXHIBIT NO. 1]



ARRG'T. OF QTRS. - BRIDGE DECK

[Endorsed]: Case No. 18303 Crim. U. S. A. vs. Francis P. O'Leary. Plf. Exhibit 1. Date Mar. 19, 1946. No. 1 Identification. Date Mar. 20, 1946. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 2]



C

. 24 0' 48 0' 3 6 MCTOM P/B.

24 5 0 0' 2 6 4 4

[Endorsed]: Case No. 18303 Crim. U. S. A. vs. Francis P. O'Leary. Plf. Exhibit 2. Date Mar. 19, 1946. No. 2 Identification. Date Mar. 20, 1946. No. 2 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. John A. Childress, Deputy Clerk.

(Testimony of Harry Maxwell Zents)

(In response to the question of defendant's counsel as to what was the scale of the drawing, counsel for the Government announced that he was not in a position to state the scale, but that some of the other officers who were there would be called as witnesses, and would testify that the captain's room, right below the red B on the small drawing was about 8 ft. wide and 11 ft. long. Counsel for the Government further stated that he had the blue print but that he had no other way of telling the scale.)

Counsel for the Government then stated that the testimony of this witness was merely preliminary and it was stipulated that defendant might cross-examine said witness at a later time.

Direct examination ended.

JAMES TRAVIS COOPER

was duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Neukom:

I was a member of the crew or an officer of the "Arthur R. Lewis" along about December 9, 1945, when it was in Seadler Harbor near Manus Island. The first mate on that ship was the defendant here, Mr. O'Leary. The captain of the ship was Captain Fithian. It was a merchant ship. I had been with the ship when it left Norfolk and steamed toward Manus Island. Later on I was told that Captain Fithian was killed on that ship. Before this I had been in the company of the chief mate, the defendant O'Leary. Somewhere close to 8 o'clock,

(Testimony of James Travis Cooper)

or shortly after, I went to the chief mate's room. He asked me over; we had a drink. I went back to my room. I was not there very long until we went back over to chief mate [5] O'Leary's room and drank some more. I don't know how many drinks he had, we were there I guess for half an hour drinking. I paid no attention to how many we drank. The last time I saw O'Leary after this drinking episode, and with reference to the time when I found out the captain had been shot, it was maybe five or ten, maybe fifteen minutes thereafter. It was not long. O'Leary and I had a sort of argument and O'Leary told me to go back to the other side of the ship; this took place right there at the argument close to nine o'clock; just shortly before the killing of the captain; the argument took place on the after boat deck on the starboard side, the right side. On this Government's Exhibit No. 2, this is the after deck, we are looking forward this way (indicating) it was close to here where I put this red X where we were having the argument (witness places red mark on exhibit).

During this incident O'Leary said he was going to try to make me go over to the other side of the ship. I told him he couldn't make me and he said some words about a gun. I don't remember the exact words he said.

In this conversation with reference to the gun I think O'Leary said if he had a gun he could make me, or he would get his gun and make me—something like that. I had seen intoxicated persons before this time, and in my opinion O'Leary was intoxicated at this time. I was the third engineer, one of the officers aboard the ship. After this incident, O'Leary and I parted; he started

(Testimony of James Travis Cooper)

back toward the door in the passageway leading in toward his room. The last place at which I saw Mr. O'Leary was at the place where I marked a "B". It was about the door, I don't know whether he went on inside the door or not. He went out of my vision. That was the last time I saw Mr. O'Leary before I heard about the captain being shot. I was aware of the location of the first mate's quarters. I note on this drawing, Government's Exhibit No. 2 that there is a first mate and that was where his quarters were. My [6] quarters were on the opposite side of the ship where it is marked Third Assistant Engineer. I did not hear any bullets that evening. When I left O'Leary, I went down in the engine room. All I know about anything further was that it came to me by hearsay. I did not go up and look at the captain's body. I saw it at the funeral. I saw the captain on the afternoon in question. He had not been drinking that I know of. I am not sure whether I saw the captain at supper or chow, at the time I ate or not; but I saw him shortly after supper; he appeared to be sober at this time; I would say he was around thirty years of age, and appeared to be in good health. I did not know of any hard feelings between O'Leary and the captain. While I was in O'Leary's room, as I have indicated on Government's Exhibit No. 2 for identification, there was a door panel kicked out. That took place while we were in there drinking; that was between eight and nine o'clock. The door panel was the door panel to the first mate's or Mr. O'Leary's door. I kicked the door panel out. Before I kicked the door panel out, I had no words or hard feelings with Mr. O'Leary; no hard words, we were just talking. I don't remember what I was

(Testimony of James Travis Cooper)

saying right at the time he told me to kick it out. As a result of that I kicked it out. Before I kicked the door panel out he said to me that he could have gotten me in trouble. He didn't say he was going to or anything; he did say what about, that I had dranken some beer. I don't remember, we was there drinking and I cannot remember just what I said, or what he said, either one.

The thing that O'Leary and I had been drinking was beer. Some time before, I had been drinking whiskey with the crew, and I remember O'Leary telling me not to ever be drinking with the crew. The main percentage of the cargo was beer being taken to the bases in the South Pacific.

Direct examination ended. [7]

Cross Examination:

By Mr. Samuelson:

I was third assistant engineer on this 'ship. I was aboard at the time we dropped anchor. I cannot say what time it was, but I think it was around three o'clock. I was on duty prior to the time I went to the first mate O'Leary's cabin. I was pumping up the domestic tanks. I got one of them filled. That was pumped right up when I went on watch at four o'clock, and at eight o'clock they switched over the pump, and I knew that I did not have anything to worry about then. I went on deck that evening at four o'clock. It was pretty close to eight o'clock when I went down to Mr. O'Leary's room, because I just got this tank filled. This was the first time I had done any drinking that evening. I guess Mr. O'Leary and I each had a water glass of whiskey while I was down there.

(Testimony of James Travis Cooper)

“Q. (Rep. Tr. p. 22, line 21 to line 1, p. 23): I suppose you were just letting your hair down after this trip you had just completed so successfully, and right after you went out on deck, you put an X on the map, I believe, and that represents, does it not, where you and Mr. O’Leary were arguing? A. Yes.”

Referring to the point marked “B”, Government’s Exhibit No. 2 for identification, just at the end of the passageway, this is close to where I last saw Mr. O’Leary. I was walking around this other way. That (indicating point on exhibit) goes down, kind of what we call a skylight in the engine room. It is not much of a skylight, it is a place for the air to go out through. This was aft, I walked toward port. Mr. O’Leary walked over toward this passageway. The witness then, at the request of the cross examiner, placed a mark “C-1” on the exhibit and stated that it was the position where he and O’Leary were standing arguing. I [8] will mark the position where I next saw Mr. O’Leary as C-2 (witness so marks).

“Q. All right. Now, will you draw a broken line to indicate the path as you left from C-1 to go to your room or the engine room, wherever you went.

A. That is—I don’t remember if I went down the hall or around on the outside. I know I come around hereby my room, but I don’t know if I went through the passageway or around the outside.

Q. Did you go to your room or to the engine room?

A. I met the chief engineer. That was somewhere close to his door. I don’t know if he was on the outside or inside, or if he was in the room, but somewhere close to his door, and he told me the fireman wanted me.

(Testimony of James Travis Cooper)

Q. And then you went down to the engine room?

A. Yes.

Q. Then will you draw an arrow showing the general direction of where you went when you left the position of C-1? Just draw a small arrow. (The witness did as requested.)

Mr. Samuelson: The marks made are on People's Exhibit No. 2?

Mr. McCormick: Government's Exhibit No. 2." (Rep. Tr. p. 24, lines 3 to 23, incl.)

I can't say how long I was down in Mr. O'Leary's cabin before I went out on deck. Well, I would say somewhere around a half hour or something like that. I cannot say for sure, because I cannot keep up with the time; never paid no attention to it. I did not at any time ever when I was alone with Mr. O'Leary or when we were talking and arguing, or at any other time, see any gun or anything similar to it in his pocket or on his person in any manner. He did not pull out any gun when he was talking to me and arguing with me. I think he was a little bit intoxicated. I did not notice when he walked away from there to the passageway [9] whether he more or less staggered or was unsteady. I don't know. We both left there at the same time together. Referring to Government's Exhibit No. 2, I cannot say how far it was from the position C-1 over to the first mate's cabin; it was three rooms and the passageway. I cannot tell you

(Testimony of James Travis Cooper)

whether it was somewhere around 60 ft., 65 ft. I cannot say. If you had the main blue prints you can look and tell. I don't know; I don't know what size the rooms are. We both left the position C-1 at the same time; when he started off towards the passageway, I started off around the other way to go to my room. While I was there, I did not hear three bells ring, or any indication that there had been engine trouble. At no time while I was there did I see a figure up on the wing of the captain's bridge; I was not paying any attention to what was up there. I did not know what time the captain was shot. I didn't hear the shots or anything. Somebody came down and told me he was shot. I didn't know. I have said that it was some five or ten or fifteen minutes after I left that position C-1 when somebody came down and told me he was shot. I know I hadn't been down there but a short while. It was a short time from the time I left Mr. O'Leary when someone came down and told me the captain was shot. As far as I know there was no ill feeling between Mr. O'Leary and the captain. As to the general feeling aboard the ship among the officers, I think they all got along together swell, and I don't know of no trouble nowhere. There was no bad blood that I knew of.

This closed the cross-examination. There was no re-direct examination.

LEWIS THOMAS WATSON,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I am nineteen years old. I was a seaman on the "Arthur R. Lewis" [10] and was present on the 9th of December, 1945. I heard the testimony of Mr. Cooper, who just preceded me, with respect to his talking of being close to Mr. O'Leary on the boat deck. I was not present, but I was a short distance away.

Referring to the position C-1 on Government's Exhibit No. 2 for identification, this C-1 should be closer in to this (indicating) and I was out here at point "B" (indicating). I was about 40 feet to the rear, towards the rear part of the ship, not on the same deck but on the next deck down, the main deck. From my position on the main deck I saw Mr. O'Leary and Mr. Cooper at the point marked C-1. I put the point C-1 up closer to the vent near the end of the arrow. I was looking up. I saw Mr. O'Leary and Mr. Cooper arguing and Mr. O'Leary pushed Mr. Cooper once. They argued awhile and Mr. O'Leary walked away and then Mr. Cooper walked away. This was about three to five minutes before the skipper was shot. I heard the bullets when the skipper was shot while I was in the gangway on the port side, the left side of the ship. I was on the main deck the same deck I was on when I saw Mr. O'Leary and Mr. Cooper on the boat deck. When I was about 40 feet back of where Mr. O'Leary and Mr. Cooper were I saw a figure up on the bridge opposite or close to the

(Testimony of Lewis Thomas Watson)

chartroom or to the wheelhouse. I do not know who that was; it was rather indistinct; it was dark, around about five minutes of 9:00.

I heard a few words of the conversation between Mr. O'Leary and Mr. Cooper. I heard Mr. O'Leary tell him once to get over on his side of the ship and Mr. Cooper told him to put him over there if he thought he was big enough. Mr. Cooper told Mr. O'Leary that he might shoot him and put him over there, but he could not otherwise. Mr. O'Leary made no response to Mr. Cooper's statement. That was all I recall of hearing and seeing. I did not go up into the captain's cabin after the shot. I am not an officer.

Direct examination ended. [11]

Cross Examination:

By Mr. McCormick:

I was on the main deck of the ship, on the rear of the ship. The next deck above me was the boat deck and the deck next to the boat deck was the captain's deck. At the time I saw Mr. O'Leary and Mr. Cooper standing on the deck above me I was standing between the 4 and 5 hatch, which are both on the aft of the ship to the rear. I was about 40 feet from these men. I was 40 feet closer to the stern of the ship than Mr. Cooper. Mr. O'Leary and Mr. Cooper were on the deck above me. The time I saw them it was 5 of 9. I have no way of fixing that other than my best judgment. We do not sound the time in bells all the time other than when the

(Testimony of Lewis Thomas Watson)

watches were made. I was not on watch at that time. I was an oiler on the ship. In my best judgment it was approximately 5 minutes to 9 in the evening when I observed these men on the deck about 40 feet from me having some sort of an argument. The last I saw of them was when I saw Mr. O'Leary first leave on that night; he went through the passageway in the direction of his cabin which was on that deck, one deck lower than the captain's cabin. I saw Mr. Cooper leave at that time; he walked toward the port side of the ship. Mr. O'Leary did not come into my view again. I do not know where he went from that time on. I went around on the gangway, on the port side of the ship; this gangway was about 100 feet from where I was when I observed these men talking on the next deck. I had just gotten to the gangway when I heard the shots ring out. I had walked 100 feet from the time I saw Mr. O'Leary head toward his cabin and arrived at the gangplank when I heard the shots ring out. I had not walked this 100 feet without stopping; I stopped at my forecastle, my quarters, which were part of the crew's quarters. I saw the figure up on the wing deck during the argument and before I started toward the gangplank. I do not know who that figure up there was. The wing deck was right up from the captain's. [12] In any event, I know that figure was not Mr. O'Leary, because I saw him up on the deck back near me.

Cross examination ended.

(Testimony of Lewis Thomas Watson)

Redirect Examination:

By Mr. Neukom:

I testified that when I saw Mr. O'Leary enter the passageway he was heading toward his cabin which was forward, on the same deck; that is correct. There is a stairway from the passageway of the boat deck, approximately in the center leading up to the bridge deck where the captain's quarters were. After I saw Mr. O'Leary enter the passage way I never saw him again; I walked away. To my best judgment it took me not less than three minutes to walk this 100 feet. From the time I started and stopped at my quarters until I heard the shot. I am not able to fix the exact period.

Questions by the Court: (Rep. Tr. p. 39, lines 12 to 23, incl.)

"Let me ask you a question. Can you estimate the time in point of time, not in distance, that elapsed from the time you saw Mr. O'Leary turn toward his quarters to the time you heard the shots?

A. About three minutes.

Q. Did I understand you to say that you saw a shadow on what they call the upper deck, the captain's deck?

A. Yes, sir.

Q. Had Mr. O'Leary started to walk toward his quarters when you saw that shadow?

A. The shadow was there during the argument.

Q. The shadow was there during the argument between O'Leary and Cooper?

A. Yes, sir."

After the questioning by the court, the witness was asked further questions by Mr. Neukom, Assistant U. S.

(Testimony of Lewis Thomas Watson)

Attorney, in [13] response to which he testified as follows:

Referring to Government's Exhibit No. 2, the point marked C-2, is the place where I saw O'Leary enter the passageway, which was on the right side of the ship. There is a door at C-2. The first room on this diagram immediately next to the door is the second mate's room. The next room is the room designated "two cadets". The next room was the third mate's room and entirely forward and in the corner is the first mate's room. There is a passageway leading from where I testified I saw Mr. O'Leary enter a door which goes forward and which terminated at the first mate's room; then the passageway turns to the left. About half way down the passageway there is another passageway which goes crosswise of the ship. At this same point, or right adjacent to the crosswise passageway, are stairs indicated by the breaks on the exhibit. They were on this ship. My testimony is that I saw Mr. O'Leary go into the door C-2 and I saw him there.

Redirect examination ended.

Recross Examination:

By Mr. McCormick:

The gangway is attached on the main deck. I did not go up or down the deck in going through the gangway. I stayed on the same level from the time I left the point where I had seen these men until I arrived at the point

(Testimony of Lewis Thomas Watson)

where I heard shots. The first mate when I last saw him was on a deck below the captain's deck. The shadow that I saw on the wing of the bridge was the figure of a man. There is no question in my mind about this.

Questions by the Court: (Rep. Tr. p. 42, line 24 through line 13, p. 43):

“Q. By the Court: Mr. O’Leary was right where you were, on the same deck at that time?

A. The next deck up. [14]

Q. The next deck up, and he was still arguing, either arguing with Cooper, or in the process of going to his quarters? A. That is right.

Q. How long would you estimate the point of time would be that you saw the shadow, the figure of a man, on the bridge deck?

A. I just noticed while they were arguing. So far as I know, it was still there when I left.

Q. It was still there when you left? Was it still there as O’Leary walked toward his quarters?

A. As well as I remember, it was.”

Government’s Exhibits No. 1 and No. 2 were then handed to the jury for inspection, each juror being handed a copy of each exhibit.

Recross examination ended.

HARRY MAXWELL ZENTS,

recalled as a witness for the Government, testified as follows:

Direct Examination:

By Mr. Neukom:

I saw Captain Fithian about the hour of five o'clock on December 9, 1945, at the mess room on the ship here in question out near Manus Island at the same time I was there. I don't remember seeing Mr. O'Leary present. When I saw the captain he appeared to be sober. I did not see him drinking at any time on that day in question. I did testify that the captain was around thirty years. On the afternoon in question December 9th, I had not seen or been present when Mr. O'Leary had been drinking. In the evening after chow I was present in the third mate's quarters next to Hamer's quarters where O'Leary had been drinking. The third mate's quarters are indicated on Government's Exhibit No. 2 by: Third Mate, on the boat deck. The captain's quarters are on the deck above; that is indicated on Government's Exhibit No. 1; [15] Captain's Office and: Captain's S. R. The third mate's office or cabin is, in my opinion, immediately beneath the captain's office. The cabins on this ship are all amidship, about the center of the ship; forward from the front of the wheelhouse to the bow of the ship is approximately 200 feet. There are no cabins along that section; that is where we load all cargoes and stow it below. From the passageway, noted on Government's Exhibit No. 2, in the rear of the cabins, the distance to the stern of the ship, in my opinion, I would say is 150 feet. I said that it was around 200 feet to the bow; I

(Testimony of Harry Maxwell Zents)

don't believe it is that far, I would say 150 feet. From the rear portion of the groups of cabins to the stern is about the same distance. This group of cabins where the quarters are just about divides the ship. When I was present in the evening in the third mate's cabin while there was some drinking, the following persons were present. To start with, Mr. O'Leary, Mr. Hamer and myself. That was approximately six o'clock. I was in the room about thirty or forty-five minutes, something like that; while there I had two drinks; they were approximately a regular shot; I don't know how much is in a shot; a regular shot, a regular glass of whiskey. The glass I mean is the kind the bartender gives you; this is about an ounce and a quarter. I did not drink my two shots of whiskey straight, I mixed mine with coke. Mr. O'Leary and Mr. Hamer were drinking. Mr. Hamer is the third mate.

I would say I was there approximately thirty minutes all told. From the third mate's room, I went to my own quarters. I did not remain in my quarters until I heard some shots; I do not know how long I remained in my quarters, but by that time I went up to the purser's room. I did not again see Mr. O'Leary until after the shots. While in the third mate's cabin, I would say that Mr. O'Leary appeared to be slightly intoxicated when I left at 6:30 or thereabouts. He had been previously drinking and that is the reason we had the conference about starting out our watches. While we were drinking, Mr. O'Leary, Mr. Hamer and I had a conference [16] about our watches, and we straightened that out. While I was in my room on the 9th of December, I did hear

(Testimony of Harry Maxwell Zents)

shots ring out or bullets. I would say this was about fifteen minutes past nine, something like that. I would say it was a little later than 9, about 15 minutes after 9:00 to my best knowledge, and it was dark. The ship was in the harbor. I was in my own quarters when I heard the shots.

Now, referring to Government's Exhibit No. 2, I was where it says "Second mate." I was to the extreme rear of that group of cabins, whereas the first mate was to the extreme right. The first burst of shots that I heard appeared to be coming from over to the port, the left side of the ship, which is the opposite side from where I was. I was on the starboard side. I don't know how many shots there were, but I know there were more than one. As soon as I heard the first burst of shots I jumped up and was in the passageway when I heard the second burst, that is the passageway immediately outside of my room on the boat deck. When I heard the second burst I knew they came from the next deck above mine and I ran up the steps. This (indicating point marked "C-3" on Government's Exhibit No. 2 placed thereon by the witness) is the point where I started up the steps from the deck on which I was. That is about the center of the superstructure of which these cabins are all a part; that is one of the more accessible means of getting from my deck to the deck above. There are other ways of getting up there; there are several different stairs, leading from deck to deck. The places marked "up" and "Up" on that particular diagram indicate other steps which lead up. I went to the bridge deck and when I started up the steps to that deck I saw Mr. Kennon at the top of the steps. Mr. Kennon was the purser. Mr. Kennon had

(Testimony of Harry Maxwell Zents)

gotten to the top before I had. His quarters are on the captain's or bridge deck; not my deck. Mr. Kennon was at the top of the stairs as I was going up. I met Mr. Kennon as I reached [17] the top of the steps and turned around towards the captain's quarters. I turned around to the passageway to the right side to go to the captain's quarters.

Referring to the diagram which has been marked with "A" "C" and "B," I would state that I saw Mr. Kennon, as near as I can recall, at the marking "A," then I proceeded from there to point marked "C" in red on the bridge deck I saw Mr. O'Leary, at or near the point "B," he was standing in a doorway in the captain's office. The door was open. I was in that vicinity—near point "C"—when I saw O'Leary at point "B." I was approximately 12 or 14 ft. from Mr. O'Leary when I saw him. I don't remember whether Mr. Kennon was with me or not. I assumed he was back of me, but I don't know whether he was or not.

"Q. By Mr. Neukom: Now, at that time when you saw Mr. O'Leary at point "B," at the captain's door, what, if anything, did you hear him say?

A. I heard him make a remark, that "This will hold you for a while," or something to that effect, but it left that meaning in my mind.

Mr. McCormick: Now, just a minute. I didn't get the last portion of his answer, and I would like to have the reporter repeat it.

The Court: I think that everything after the words "this will hold you for a while" should be stricken.

Mr. McCormick: That was my impression.

(Testimony of Harry Maxwell Zents)

The Court: Yes. I will strike it, and tell you to disregard it. Where was O'Leary at the time, did you say?

The Witness: Standing in the doorway leading into the captain's office.

The Court: What?

The Witness: Standing in the doorway that goes into the captain's office." (Rep. Tr. p. 57, line 21, to and incl. line 15, p. 58.) [18]

(Witness Continuing):

Mr. O'Leary was facing in the door inside towards the captain's office. I would say it was 20 or 30 seconds after I heard the first volley of shots that I saw O'Leary in the doorway leading into the captain's quarters. The captain's quarters are divided into office and sort of bedroom. The door at "B" was the door to his office not to his bedroom.

Referring to Government's Exhibit No. 1, the bridge deck diagram, the door right close to little letter "c" is the door that leads into the captain's bedroom. I don't recall the door to the captain's bedroom being open at the time I saw Mr. O'Leary when I was at or near point "C."

The picture last referred to was then offered and received in evidence as Government's Exhibit No. 3.

This other picture you now show me is inside the captain's bedroom, the inside door.

This third picture which you now show me is a picture of a passageway on the ship.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 4.

(Testimony of Harry Maxwell Zents)

This other picture which you now show me, which has a clock in it and filing cabinets and a desk, that is a picture inside the captain's office, the side nearest the passageway.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 5.

After I had seen Mr. O'Leary at point "B," I retraced my steps, went to point "A." At that point, that is where I heard the voice of Mr. Noble, Chief Engineer. (Tr. 61-64.) I heard a remark—it was the voice of Mr. Noble. I did not see Mr. Noble at the time I heard his voice nor did I see Mr. O'Leary at that time. At that point I could not see either of them, Mr. O'Leary or Mr. Noble. I heard the remark when I was standing at the top [19] of the stairway at Point "A." (Tr. 62-64.)

I stopped at point "A" until Mr. Noble and Mr. O'Leary walked by me. They went down the steps to the boat deck. I don't know how long it was after I had seen Mr. O'Leary at point "B" that they walked by me. I was puzzled by what to do at the time and I [19a] wouldn't say it was more than a minute or so, if it was that. The skipper was in charge and I was the third in charge. I had not yet walked into the room and had not seen the condition of the captain of the vessel. I did not know whether he had been killed or not. I went into the captain's quarters right away, just a matter of a few seconds after Mr. O'Leary and Mr. Noble walked by me. When I walked in I saw the captain sitting in a settee, bent over, with his arms almost down to the deck. He was in a position something like this

(Testimony of Harry Maxwell Zents)

(indicating), with his arms down between his legs. He was alone, no one else was near the quarters at that time. I saw blood. I saw a gun; this gun was by the right foot of the captain.

Referring to this gun which you now show me (a Smith & Wesson revolver shown witness by Mr. Neukom), the best of my recollection this gun is similar to the one seen by the captain's feet. I am not sure whether it was the same gun as this. I looked at the gun that was there the next day or a few days later. It was a gun of similar character.

The gun last above mentioned was offered and received in evidence as Government's Exhibit No. 6.

After the boat had left the canal, and before this incident, I had seen Mr. O'Leary with a pistol of a similar character as the one here. This was on one occasion when the ship was at sea, I would say a week or so out of Balboa, Canal Zone. I don't know exactly the date. On this occasion Mr. O'Leary was shooting at a bird.

As I have previously stated, I saw the captain bent over and saw blood. When I first saw the captain he did not appear to be alive. He appeared to be dead or dying. The captain did die and he was taken off the ship. I attended the funeral of Captain Fithian.

After I was in the captain's room I felt his pulse, and he was apparently dead; it was negative. Mr. Kennon, the purser, [20] came in. He gave the captain a mirror test. Then I left and went to the bridge, up on the flying bridge, the most upper bridge in the ship. I went up there to notify the proper authorities. I later saw Mr. O'Leary in his quarters. He was in his quarters ap-

(Testimony of Harry Maxwell Zents)

parently preparing to get in his bunk so I didn't bother him. I don't remember whether he was dressed or undressed. He was later placed in custody pursuant to my orders.

The picture which you now show me of a settee is a picture of the settee on which the captain was sitting when he was slumped over.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 7.

This next picture of a settee and also a porthole which you show me, that is also in the captain's office.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 8.

This next picture which you show me is a picture of the door between the captain's office and his bedroom.

The picture last referred to was offered and received in evidence as Government's Exhibit No. 9.

After the death of the captain, I assisted in removing bullets from the room. I found slugs in certain places in the room. I found three in all embedded in the wall, they were brass-nosed, and there were three others found in various places in the office and one in the chartroom.

The six slugs or bullets which you now hand me are the ones found by me and the other two who assisted in picking them out of the wall or wherever they were, and I marked them with my initials. Six casings of

(Testimony of Harry Maxwell Zents)

bullets were also found in the gun. I am not sure that the six casings now shown me were those found in the gun. The six bullets above mentioned were offered and received in evidence as Government's Exhibit No. 10.

Direct examination ended. [21]

Cross-Examination:

By Mr. McCormick:

It was approximately around between 6 and 6:30 on the afternoon of our arrival at Manus that I saw any drinking whatever. That was in Mr. Hamer's, the third mate's quarters. When I first went in to have a drink there were just the three of us there, Mr. O'Leary, Mr. Hamer and myself. Others of the officers came in while I was there. The radio operator came in but did not drink. The first drink we had there were only the three of us. The next drink was when the other officers came in, Mr. Noble, Mr. Berg, the steward, and the second engineer, Mr. Shunk. I don't recall who else came in.

"Q. By Mr. McCormick: (Rep. Tr. p. 78, line 1 to 4 incl.): Let me ask you this: With the exception of the captain, was there any one of the officers that was not in there on one occasion at least, and had a drink? A. I didn't see Mr. Cooper.

As to the amount of liquor consumed there up until the time I heard the shots, there were six shots, that is, two apiece for the three of us while I was there, and I left before the others started to drink. I don't know how much was consumed thereafter.

I don't know whether a number of empty whiskey bottles were disposed of after the captain was discovered.

(Testimony of Harry Maxwell Zents)

I did not see any myself. I could not say that a great many of the crew were drinking that evening. The only ones that I saw actually take a drink were the three of us, and that was during the half hour I stayed in the third mate's quarters. It was at 6:30 that I went directly to my own quarters. I had had chow at that time. We had chow aboard ship approximately at 5 or 5:30. This drinking took place after dinner. I did not see anyone drink aboard ship before dinner. I saw evidence of someone having been drinking.

After I returned to my quarters at 6:30 from the third mate's [22] quarters, I did not stay there until I heard the shots. I wrote a few letters and in the meantime I had gone up to the purser's room and listened to the radio and talked with him and got some stationery. I also went into the chartroom and tuned on the master radio so that I could tune in my speaker down in my room and also was on deck and had a few cups of cocoa and returned to my room. It was approximately fifteen minutes after 9 when I finally returned to my room the last time before going up to the captain's quarters. I sat down and started to write when I heard the shots. After that I got up and went out of my cabin into the passageway on the boat deck, one deck below the captain's.

When I first heard the shots I was under the impression that they came from the port side of the ship, my cabin being on the starboard side, the same side as the captain's cabin. The first I heard gave me the impression that the shots were over on the port or left-hand side of the bridge, that is on the boat deck, which

(Testimony of Harry Maxwell Zents)

is the deck on which I was standing. When I first got into the companionway I was not sure exactly which way to proceed. I started over in the passageway going directly through under the passageway out on the left side of the ship, the port side. I mean by that that I would be going across the middle of the ship. I first saw the purser at the top of the steps; I was in the process of going up a sort of ladder or steps when I saw him standing there. I then went up and stopped at least momentarily in the presence of the purser. Then I went down around the passageway so that I was able to see the doorway into the captain's office. I don't know whether the purser was with me then or not.

(Rep. Tr. p. 82, line 23, to line 25, p. 23): "Q. Let me ask you this: From the point where you met the purser to the point where you were able to see the captain's doorway, how great a distance is that?

A. From the point I met the purser to the point of the captain's [23] doorway?

Q. Yes, let me see if I can picture it here. If we use this jury box as being the bulkheads which surround that; let these represent the boiler casing, and this represents, the counsel table here, the stairway through which you came up on the captain's deck. Then you would have had to have walked down, or it would have been the other way, wouldn't it—no, you walked down that way before you could see around the bulkhead to see the captain's door, is that correct?

A. That is correct.

Q. You understand what I am talking about?

A. Yes. The steps come up this way.

(Testimony of Harry Maxwell Zents)

Q. Let us assume that you met the purser where I am pointing. You left him, walked around the bulkhead, where you came down the companion way. How far would you have been from the point where you first ran into the purser there?

A. About 10 or 15 feet.

Q. No more than that?

A. No, I don't believe it is any more than that.

Q. In any event, if he was directly with you, or that far behind, you don't recall? A. I don't recall."

That evening, by reason of either myself or some other person signalling for help some naval officers came aboard the ship. They came aboard about 20 minutes after ten. First the Doctor, then the chief boatswain from the U. S. S. "Hercules" came aboard; I would say ten minutes later the Shore Police came aboard, the provost marshal. I do not recall how many there were; I would say seven or eight. They immediately set about an investigation aboard ship. On the following day, December 10th, there was a hearing conducted by a Board of Investigation. The shooting was Sunday, December 9th. I don't know whether it was Monday, the next day, that [24] the Board of Investigation met, but I don't believe it was, because they questioned me the morning of December 10th; then I came back aboard the ship; I don't know about the rest of them, whether they had a hearing. I was first questioned in the early hours of the morning of December 10th. I was asked for a statement about my observations on the 9th of December.

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(Rep. Tr. p. 85, line 14, through line 23, p. 93):
“Q. and at that time you made no mention of the fact that you had heard Mr. O’Leary make a statement at the doorway into the captain’s cabin, did you?”

A. I don’t believe I did.

Q. Isn’t it your recollection that you did not?

A. Well, I don’t know whether I did or not.

Q. It is your best recollection that you did not, isn’t it?

A. I don’t believe I did. I don’t know for sure whether I did or not.

Q. Do you remember that there was a hearing conducted with reference to this incident by the United States Coast Guard?

A. No, the United States Coast Guard was down there, but I don’t remember whether I gave any statements to them or not.

Q. Let me see if I can refresh your recollection. Isn’t it true that on the 19th of December, 1945, you were examined by Frank D. Springer, Jr., Lieutenant, United States Coast Guard, at which time the reporter was Richard E. Halloran, 2nd Class, also United States Coast Guard? A. Yes.

Q. You remember that incident, don’t you?

A. Yes.”

“Mr. McCormick: Incidentally, if your Honor please, Mr. Neukom has indicated his willingness to stipulate that the transcript of that hearing that I have may be used by me without objection in lieu of the original not being here. Is that correct?” [25]

“Mr. Neukom: Surely; That is agreeable.

(Testimony of Harry Maxwell Zents)

“Q. By Mr. McCormick: The 19th would have been some 10 days following this incident, would it not, Mr. Zents? A. That is correct.

Q. In the meantime you had become master of this vessel, had you not? At least you were in charge?

A. I was in charge.

Q. The captain was dead, and Mr. O’Leary, the first mate, was in custody? A. That is correct.

Q. You were the first officer examined by Lieutenant Springer, were you not?

A. I don’t recall whether I was or not.

Q. Do you remember the incident of his examining you? A. Yes, I believe I do remember the incident.

Q. At that time, did you have a fair recollection of the events of the evening of December 9th?

A. I guess I had.

Q. I am going to ask you if some questions were not asked of you at that time, in the presence of these parties, Mr. Zents, and if you did not give the answers that I am going to indicate, so follow me, and if you want to look at this with me, I will be glad to bring it up there. Do you remember Lieutenant Springer asking you:

“Q—Where did you go after you heard the shots?

A—The minute I heard the shots I believe I went from my room. I figured they were on the port side. I thought the mate was shooting at some fishes. I knew that he was drinking so I was going to see what happened. When the next bunch of shots came I was some place in the ‘midship passageway between the boiler casing and the officers’ showers in the way of the ladder going to the boat deck. I ran up topside.’ [26]

(Testimony of Harry Maxwell Zents)

"Did you give that answer to that question?

A. I don't recall exactly. I know I was somewhere in the passageway there. I don't know whether I was between the boiler casing and the ladder.

Q. You follow this document with me. I now direct your attention to the following questions and answers appearing from line 1 to line 4, inclusive, page 7.

'Q—Who did you see topside?

A.—I met the purser as soon as I reached the top of the ladder.

Q—Where did you see him?

A—Right at the top; standing at the top.'

"Wasn't that your answer?

A. Yes, sir, I believe so.

Q. Was that the fact, as it occurred?

A. Yes, sir.

'Q—Mr. Zents, I show you a blueprint here, Accommodation Plan, Bridge Deck House for the S. S. "Arthur R. Lewis," and we will mark this Exhibit Two, and you had arrived at position one and you saw the purser at position two, which is almost in line with the bulkhead that runs along the aft part of the ladder.

'A—Yes, sir.

'Q—What was the purser doing?

'A—When I saw him then—I didn't notice him until I got to the top of the stairs.'

"That was your testimony, was it not?

A. I believe that is correct.

Q. Now, at that time you had not seen the chief mate, had you? A. No, sir.

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Q. Then the question:

'Q—Then where did you go?

'A—I went first and he went next—right after me. [27] went around the 'midship passage toward the door leading into the captain's stateroom.'

"Now, was that your testimony?

A. I don't remember if I said that or not.

Q. Does this transcript I am showing you refresh your recollection as to whether or not you said it, and in that form?

A. I probably told it to him in that way, because I assumed that the purser was with me, but I can't exactly say whether the purser was with me or not.

Q. Was the door closed at that time, that is, the door into the captain's stateroom?

A. I am not sure, but I believe it was.

Q. When you saw Mr. O'Leary standing in the doorway, was the door closed?

A. Yes, but that was to the captain's office.

Q. When you referred to the captain's stateroom, you are referring to the doorway to which you first came upon your arriving at the end of the passageway which ran athwartship?

A. That is correct.

Q. And the captain's office was down further toward the stern?

A. Toward the bow.

Q. So when asked at that time whether or not the door was closed, your answer was "Yes, sir," was it not?

A. I guess it was. I don't know.

Q. Will you tell us whether or not this question was not asked you—incidentally, I want to be sure that you know what I am talking about, Mr. Zents. You recall, we are speaking about the incident of Lieutenant Springer,

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of the Coast Guard, asking you these questions at the time when there was a reporter present taking down your answers, do you not? A. Yes, sir.

Q. At that time, weren't you asked the following question: [28]

'Q—When did you first see the chief mate?

'A—As soon as we got to the corner standing in the captain's doorway—leaning in the captain's doorway.'

"That was your testimony, was it not?

Mr. Neukom: Your Honor, I have not objected, but I feel that a continuation of this is not impeaching the witness. I can't see where this last question deviates one slightest bit from what the witness has previously testified to.

The Court: That does not make it improper cross examination. Certainly, as he described it here, what he saw, any deviation from that description is permissible and it is afterwards a question of argument whether it is contradictory or not.

Mr. Neukom: Very well.

Mr. McCormick: In answer to your remark I think that will appear in just a moment, Mr. Neukom.

Mr. Neukom: Very well."

"Q. By Mr. McCormick:

'Q—In the doorway leading to the captain's office in the position marked Three?

'A—Yes, **sir**.'

"You so testified, didn't you?

A. Where I saw the chief mate?

Q. Yes. A. Yes, that is correct.

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Q. There is no doubt in your mind about that, is there? A. No, there is no doubt.

Q. The next question:

'Q—Was he looking in the office?

'A—Yes, sir. We paused for a minute, and he turned his head and looked at us.'

Was that not your testimony?

A. A part of the testimony, about him looking at us, is correct, [29] but I can't recall all of these—'

"Q. I wasn't inquiring whether or not it was correct, Mr. Zents. I am simply inquiring whether you did not make and give those answers to Lieutenant Springer at the time he asked you those questions and they were taken down by the reporter indicated. Let me restate it to you, so that you will get it. Wasn't the question asked you:

'Q—Was he looking in the office? .

'A—Yes, sir. We paused for a minute, and he turned his head and looked at us.'

"Was that not your testimony?

A. *A part of the testimony, about him looking at us, is correct, but I can't recall all of these—*

Q. *I wasn't inquiring whether or not it was correct, Mr. Zents. I am simply inquiring whether you did not make and give those answers to Lieutenant Springer at the time he asked you those questions and they were taken down by the reporter indicated. Let me restate it to you, so that you will get it. Wasn't the question asked you:*

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'Q—Was he looking in the office?

'A—Yes, sir. We paused for a minute, and he turned his head and looked at us.'

'Now, didn't you so testify? A. I don't recall.

Q. You don't remember that?

A. I remember part of it.

Q. Now, let me ask you this: Wasn't the next question asked of you by Lieutenant Springer at that time under those circumstances as follows:

'What did he say?'

"And wasn't your answer, 'Nothing'?"

"A. No, he didn't say anything to me. [30]

"Q. Is that your answer at the present time?"

A. Yes. He didn't speak to me.

Q. I don't think you understood the question, did you, Mr. Zents? I am asking you whether or not you did not give that answer to Lieutenant Springer in response to the question which I have read to you.

A. I—I don't understand what you mean.

The Court: Well, he asked you if you were asked a question and gave a certain answer, that is all.

The Witness: Well, he didn't say nothing to me, though.

The Court: About whom are you talking?

The Witness: Mr. O'Leary. Mr. O'Leary made no remark to me at that time, but he turned and looked at us, and he made no remark.

The Court: All right.

Q. By Mr. McCormick: In other words, your testimony now, at least, is that when Lieutenant Springer asked you what Mr. O'Leary had said at that time, when

(Testimony of Harry Maxwell Zents)

you gave your answer as 'Nothing,' you meant by that that he didn't say anything to you; is that correct?

A. That is correct."

At least on one occasion I went up into the wheelhouse with the Naval Officers when they came aboard, particularly the Shore Patrol Officers, and commenced their investigation. The wheelhouse is forward of the captain's cabin.

I don't know—I don't recall whether on one occasion of my going up to the wheelhouse my attention was called to some blood or what appeared to be blood stains on the door between the passageway running between the captain's room and the wheelhouse.

As far as I know there were three pistols of the same kind as the gun introduced in evidence here aboard that ship. As far [31] as I know they were kept in the captain's quarters. Well, I saw two there. Well, I saw all three of them in the captain's quarters that night. That night I observed one of the Naval Officers wrap a handkerchief around one of the pistols and take it away with him; that was when the first Naval authorities arrived. That was the Chief Boatswain from the U. S. S. "Hercules"; also a doctor came with them; they were the first naval officers that arrived aboard ship; they went directly to the captain's quarters and I went with them. It was shortly thereafter that the gun was picked up off the floor and wrapped in a handkerchief by the Chief Boatswain off the U. S. S. "Hercules." He took it into his possession and later gave it to Lieutenant Commander Regan, who arrived a few minutes later; he was one of the shore patrol officers, the provost marshal. I don't recall seeing the engineer's report to

(Testimony of Harry Maxwell Zents)

the captain in the captain's quarters that night. As to engine trouble aboard the ship, I know we had some on the way over, but I don't know about that day. After the shooting I observed a piece of paper on the deck of the captain's stateroom with what appeared to be a bloody foot print thereon. I think one of the naval officers took this into his possession.

Cross examination ended.

Redirect Examination:

By Mr. Neukom: As to the steps, they are not a ladder in the sense that they go straight up and down; they slant like the average stairway, but probably a little steeper, but they are steps. It is not necessary to hold on to something to go up them; no, sir, they are not that steep. The steps slant approximately 45 degrees.

I had noticed evidence of drinking by Mr. O'Leary before dinner. His condition was just talkative. When I saw him in his own room after the shooting I would say he was pretty well in- [32] toxicated. I just saw him in the passageway, I was not up to his room. When I saw him outside the captain's office or door he appeared to be intoxicated.

Now, as to my statement on cross examination by Mr. McCormick, that, in response to a question by Lieutenant Springer I had stated that O'Leary said nothing when I saw him at the door, my explanation is that Mr. O'Leary said nothing to me, but he had made a statement while I was there. He was not looking at me when he made the statement. He had the side of his face to me and was looking into the captain's office.

(Testimony of Harry Maxwell Zents)

Two of the guns I found in the file drawer in the captain's office; the other one is the one that I have said was by the captain's feet.

Redirect examination ended.

Recross Examination:

By Mr. McCormick:

At no time did I observe any blood on Mr. O'Leary's person.

Recross examination ended.

In response to questions by the Court the witness testified as follows:

Again referring to my testimony to the effect that when I saw O'Leary in his room after the shooting he was apparently getting into his bunk, the thing that made me assume he was getting into his bunk was he was standing by his bed, and the bunks are high and he was standing in a position like he was going to lie down. I don't recall whether he was fully dressed or not. I did not see Mr. Noble by the Captain's door; I did see Mr. O'Leary by the captain's door and later on Mr. Noble on the same deck, but not near the door. I saw Mr. O'Leary and Mr. Noble between "A" and "C" marked on this (Government's Exhibit No.) and they were going towards "A" down the steps. I did not see how they [33] got there or how they met.

(Testimony of Harry Maxwell Zents)

Redirect Examination:

By Mr. Neukom (Rep. Tr. p. 103, line 4 to line 14, incl.):

“Q. I think this has been covered, but I think maybe the jury don't know it. This portion on Government's Exhibit 1 which says “boiler casing,” and then there is a square that is all metal that goes from the deck to the top of the—to the bottom of the deck above it; isn't that right? A. Yes, sir.

Q. I mean you can't see through that square?

A. No, sir.

Q. That is all metal bulkhead all around there?

A. Yes, sir, that's correct.

Mr. Neukom: That is the only point I want to cover.”

Redirect examination ended.

Recross Examination:

By Mr. McCormick:

I did not see a gun in Mr. O'Leary's possession at any time during the evening of December 9th. Just one of the guns that I found in the captain's cabin had been fired.

“Q. By Mr. McCormick (Rep. Tr. p. 104, line 10 to line 11, p. 105): And you found three guns in the captain's stateroom, two of which had been fired; is that correct? A. Just one had been fired.

Q. How? A. Just one had been fired.

Q. Just one of the guns had been fired?

A. As far as I know, that had been fired.

Q. All right. Now, with reference to your qualification of your answer to Lieutenant Springer's question

(Testimony of Harry Maxwell Zents)

to you at the Coast Guard hearing, you have given us your explanation of why it was that you [34] answered to that question stating that Mr. O'Leary had not said anything to you. It is true, is it not, Mr. Zente, that neither on the occasion of your first inquiry on December the 10th by the naval officers, nor on the occasion of the second inquiry on December 19th by the Coast Guard officers, did you attribute the statement to Mr. O'Leary that you have testified to in this proceeding? Is that not correct?

A. I don't recall. For 10 days straight I was asked questions there day and night. I don't recall if they asked me that question or not.

Q. Well, you recall now about my asking you about the hearing, on my first cross examination, with reference to the first naval hearing, and you answered the question in that light? A. Yes, I recall."

This closed the testimony of Witness Harry Maxwell Zents.

EDWIN F. AUNE,

called as a witness by and on behalf of the Government, was duly sworn and testified as follows:

Direct Examination:

By Mr. Neukom:

I am a doctor and am at present in the United States Naval Reserve. Around about December of 1945, I was stationed at Base Hospital 15, Manus, in the Admiralties. I am a graduate doctor of Long Island College of Medicine in New York. I am not licensed to practice. I had nine months internship and then went right in the Navy.

(Testimony of Edwin F. Aune)

I have carried on the duties of a doctor in the Navy. On the evening of December 10th, I performed an autopsy on the body of Austin Stuart Fithian. I have refreshed my memory as to my findings. Externally there were 12 bullet holes, located in the anterior-posterior chest, in the right shoulder region, in the right forearm, in the right hand, and in the right knee. These were wounds of entrance and exit. Yes, I found perforations and [35] lacerations of the heart and lungs with extensive intrapleural and intra-pericardial hemorrhage. There was an examination conducted on the body of Captain Fithian to ascertain whether or not Captain Fithian showed any evidence of having used alcoholics; the finding was negative. From the entire examination of the body it appeared to me that it had been that of a normal, healthy young man. In my opinion, the cause of the death of Captain Fithian was well, multiple gunshot wounds with extensive intra-pleural and intra-pericardial hemorrhage. Putting this into simple language, it was caused by gunshot wounds of the heart and lungs.

Direct examination ended.

Cross Examination:

By Mr. McCormick:

I did not examine the defendant, Mr. O'Leary, at any time on the ship.

Cross examination ended.

Redirect Examination:

By Mr. Neukom:

I was not aboard the ship the "Arthur R. Lewis."

Redirect examination ended.

Whereupon, the Court, having duly admonished the jury, an adjournment was taken until 10:00 o'clock A. M. Wednesday, March 20, 1946.

LEWIS THOMAS WATSON,

recalled as a witness for the Government, testified as follows:

Direct Examination:

By Mr. Neukom:

Referring to the diagram (marked Government's Exhibit No. 12, for identification) and particularly the upper deck, I was at the point X when I saw Mr. O'Leary and Mr. Cooper and they were on the deck above. There were some bulb lights on the ship, and [36] after I saw O'Leary and Cooper leave my line of vision, I walked into the passageway, into my quarters, and the line I am placing on the drawing, commencing with the point X, going through the passageway, is my line of travel. I stood at point "O" in my quarters. The point "A" marks the place where I was when I heard the burst of shots. My quarters were at point "O" and I spoke to a seaman there before going to point "A." The ship was 441 feet in length and between 50 and 60 feet in width from skin to skin.

Immediately above the "Upper deck," shown on the blue print was the boat deck and then the captain's deck. I saw Cooper and O'Leary on the boat deck. The ship's superstructure is in the center. Points "1" and "2" (Government's Exhibit No. 11) indicate the superstructure; point "3" indicates the bow and point "4" the stern. From point "1" to the stern of the ship there are some cabins and some hatch covers, but it is flat.

(Testimony of Thomas Watson)

The same is true of the forward part of the ship on that deck.

“(Rep. Tr. p. 118, line 19 to line 22, p. 119): Q. By Mr. Neukom: At any time on the voyage from Balboa to Manus Island did you see Mr. O'Leary with a gun?

Mr. McCormick: If your Honor please, that is objected to as incompetent, irrelevant, and immaterial and too remote.

The Court: What was it?

Mr. Neukom: I have asked if he saw Mr. O'Leary at any time with a gun.

The Court: Well, I think similar testimony had been introduced before upon the subject, that they were shooting birds.

Mr. McCormick: But this covers from the time they left Panama until they arrived at Manus, which is half-way around the world.

The Court: Well, I don't know how long that would mean in point of time in these days. I don't know that that would take very long.

Mr. McCormick: It would in O'Leary's ship, I will guarantee you [37] that, your Honor.

The Court: The objection is overruled.

Q. By Br. Neukom: The question is: Did you ever see Mr. O'Leary with a gun?

A. I saw him once shooting at some seagulls or seabirds of some kind.

Q. And what character of gun was it?

A. It was something similar to that, but as well as I remember it was silver-plated.

(Testimony of Thomas Watson)

Q. When you say "similar to that," are you referring to the gun I am holding in my hand, Government's Exhibit No. 2? A. Yes, sir."

Direct examination ended:

Cross Examination:

By Mr. Samuelson:

When I saw O'Leary shooting birds, I was on the port side and he was on the starboard side. I was 50 to 60 feet away. The wing of the captain's bridge where I saw the man that I didn't recognize is not the bridge which is patrolled by the officer of watch. That bridge is one deck above. I mark Government's Exhibit No. 1 with a "W-1"—that is where I saw the figure of a man. There was a ladder which led to the captain's deck, which was right next to the passageway that Mr. O'Leary entered. I have marked that "L" on Government's Exhibit No. 1. The passageway that O'Leary entered was about seven or eight feet from the ladder.

Cross examination ended.

WILLIE VANCE HAMER,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

By Mr. Neukom:

I was the third mate on the "Arthur R. Lewis" on December [38] 9, 1945, and I recall the incident of the captain's death. Shortly after supper, in my cabin, Mr. Zents, Mr. O'Leary and I had two drinks together, and then Mr. Shunk, the second assistant engineer Mr. Noble, the Chief engineer, Mr. Berg, the first assistant

(Testimony of Willie Vance Hamer)

engineer and a steward came in. Mr. Zents left after the first two drinks. Afterwards I went by Zent's room, before the shooting, just before I went to bed and told him not to forget to call me at 12 o'clock to go on duty. I was going to relieve Zents. He was on duty from 8 o'clock until midnight.

When I first saw O'Leary round about 6 o'clock I couldn't definitely say he had or had not been drinking. He had about four drinks in my cabin before he left, at about 7:30 or 20 minutes to 8:00. The time is a rough guess. Mr. Zents left an hour before. Some drinking took place during that period, but mostly jokes and laughter.

My cabin is shown as the Third Mate's cabin on Government's Exhibit No. 2. The captain's office was almost directly above my cabin. I saw Mr. O'Leary again after I had gone to bed. He opened my door, looked in and remarked "that the third mate is asleep already." I don't know about what hour that was. I was almost asleep but heard those remarks, but I have no way of fixing the time of the incident with respect to the shooting. The next thing I heard were the shots. I looked at my watch, and it was 9:20. The shots first sounded like they were on the bridge on the starboard wing of the lower bridge, which was above me. Then I got to thinking they sounded like they had come from overhead. After I heard the shots, I heard fast moving foot steps and something slam. Captain Fifthian had not been in my room drinking. I saw him at chow and he appeared to be sober. That was the last time I saw him before his death.

(Testimony of Willie Vance Hamer)

I am not definitely sure, but it was on three occasions that I saw O'Leary with a pistol between Panama and Balboa. The first time [39] he was shooting at a bird, and another time, one afternoon, he had thought he saw a shark or fish and he dashed down below and came up with a gun, although he didn't do any shooting. The other time was Sunday, December 9th, approaching Manus, when he saw something that looked like a fish or log and he went down to get his gun. I didn't see where he went to get it, but he returned with a gun and it was a black-looking pistol.

When O'Leary left my room about 7:30, he appeared to be feeling the whiskey all right. He didn't appear to be too intoxicated. I saw O'Leary after the shooting in his stateroom. I was in the passageway and he was in bed. I did not go into the stateroom and have no idea how long it was after the shooting. After the shooting I saw the captain in his stateroom. I saw blood and he appeared to be dead.

Direct examination ended.

Cross Examination:

By Mr. Samuelson:

I started drinking with O'Leary after supper. We had two drinks together, and then I think we had one or two more drinks after Mr. Zents left. I did not drink with him that night in his cabin.

The gun I saw Mr. O'Leary with appeared to be similar to Government's Exhibit No. 6. It was a black color. I don't know how long it was from the time when I went to my room until I heard the shots. I went to

(Testimony of Willie Vance Hamer)

bed somewhere between 8:00 and 9:00 o'clock and went to sleep. I left O'Leary somewhere between quarter of 8:00 and 20 minutes of 8:00. I don't remember seeing Mr. Watson in O'Leary's room at all. I went to bed not more than 10 minutes after I left O'Leary. The best I can say is I went to bed around 8:00 and heard the shots some time later. The first thing I heard were the shots. The head of my bunk is next to the forward passage- [40] way, and that passageway separates O'Leary's room from my room. I did not hear any noise that night like the kicking out of the kick-out panel in O'Leary's room between 8 and 9 o'clock. I was awakened by gun shots and after the gun shots I heard fast moving footsteps, then something slam. I don't know what it was. There are some exits from the captain's deck that go up the monkey bridge. They are ladders and from the captain's deck or office you go right to the main wheelhouse and come out to the wing of the bridge, and there is a ladder there going up to the monkey bridge. I have drawn a rectangle on Government's Exhibit No. 1 and marked it H-1, that is the ladder which is described. Another means of passage from the captain's deck to the monkey bridge is from the captain's office, through the main wheelhouse over to the port side bridge, then come out on the wing on the lower bridge; then there is a ladder which goes straight up the bulkhead to the monkey bridge. I have marked that as H-2 on Government's Exhibit No. 1. There is another way to go from the

(Testimony of Willie Vance Hamer)

captain's deck to the monkey bridge, by going out into the passageway into the 'thwartship passageway, then in by the gyrocompass room. There is a ladder there which goes up to the monkey bridge. I have marked that H-3 on Government's Exhibit No. 1. These are the only three passageways to go from the captain's deck to the monkey deck.

I don't know how long after I heard the pistol shots that I got to the bridge. When I first heard the shots, I raised up in my bed and closed my porthole. I got up, locked the door, dressed and went aft to the boat deck and looked up toward the bridge. I didn't see anyone. I walked toward the portside and didn't see anyone, and I saw the signal light going from the port wing of the bridge. I started for the port wing and when I got to the ladder leading to the lower bridge on the port side, I know that on the way up that ladder I saw the purser.

Cross examination ended. [41]

Redirect Examination:

By Mr. Neukom:

The monkey bridge is not shown on Government's Exhibit No. 1 of Government's Exhibit No. 2. It is above the captain's deck on the very top of the ship. The point "W-1" on Government's Exhibit No. 1 is a wing of the bridge. The wheelhouse is immediately to the left of this wing. Customarily on liberty ships, the steering and navigation of the officer on watch is up above the

(Testimony of Willie Vance Hamer)

wing of the bridge on the monkey bridge. I have seen Captain Fithian a number of times on the wing at "W-1." Most every day he would go out there and look around. A person can obtain a good view starboard side of the ship from that point.

Redirect examination ended.

Recross Examination:

By Mr. Samuelson:

I have seen the captain on the port side of the bridge, but not as often as on the starboard side. After the shots, I didn't go immediately to the captain's deck; I went up to the monkey bridge where they were sending messages first. "H-6" on Government's Exhibit No. 2 marks the point that I started from my room; "H-7" is the ladder that I took to go up to the monkey bridge. That ladder only goes to the top of the lower bridge, then there is another ladder to go straight up.

I was present when they asked me questions, but I don't know what hearings they were; there were questions so many times. At no time did they call my attention to blood on the door which lead from the wheelhouse down the passageway to the deck below. I did not examine the chartroom or the wheelhouse, or the door that lead from the wheelhouse down to the lower passageway after the shooting. I did not at any time see blood on the lower quarter of that door.

Recross examination ended. [42]

HUGH LLOYD MEACHAM,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I was a boatswain aboard the "Arthur R. Lewis" on December 9, 1945. My job was to run the deck gang under the supervision of the mate. On the night in question I did not hear any burst of shots. I saw O'Leary after I had been told that the captain had been killed. He was handcuffed in his regular bunk in his quarters. That was about five minutes after 9:20. Charles Dunn, an able seaman on the ship was with me. While I was at O'Leary's quarters there was a light on part of the time and part of the time it wasn't. When the light was on the vision is better than it is in this court room. I looked at O'Leary's arms, he was handcuffed, and was moving his arms back and forth and I saw a stain on one of his arms; which one I cannot say, but it was a spot that might have been a little longer or a little wider than a silver dollar; it was oblong to the best of my memory. Naturally at that time I would think it was blood, but it could have been anything; it could have been cocoa or rust or anything, but it was dry, the stain that I saw. I have seen blood that is dried, but I cannot say whether or not the stain on O'Leary's arms appeared at that time to resemble blood that I had previously seen. Mr. O'Leary was drunk, but I don't think he was out of his head so much that he didn't know what he was doing. His eyes were open and he was looking at me. He spoke to us, that is, Mr. Dunn and the carpenter, Mr. Lupton, and me. The deck engineer

(Testimony of Hugh Lloyd Meacham)

was outside in the passageway and O'Leary asked him where Captain Fithian was. The deck engineer told him that Captain Fithian had gone ashore and O'Leary told him that he knew well that he hadn't. I don't recall anything else being said.

I had seen O'Leary with a gun aboard the "Arthur R. [43] Lewis" on one occasion, but I can't definitely say whether it was between Norfolk and the Canal, or the Canal and Manus. It was a revolver. O'Leary told me it was a 38-Colt. It was a revolver of the character of Government's Exhibit No. 6.

Direct examination ended.

Cross Examination:

By Mr. Samuelson:

While I was in O'Leary's room that night, the Navy doctor came in and took some blood from O'Leary's arms. I don't know which arm, but it was at about the elbow. I don't know which arm, but it was at about the elbow. It bled quite a little bit and the blood ran down around his wrists. He didn't have any clothes on. He had on only his socks and shorts, nothing above. He was dressed that way when I came in. That night the third mate ordered me to throw the whiskey bottles in his room or in Mr. O'Leary's room overboard.

Mr. O'Leary told me the gun he was using was a Colt-38. Government's Exhibit No. 6 is a Smith & Wesson-38; the gun that O'Leary was using was similar to this one.

Cross examination ended.

(Testimony of Hugh Lloyd Meacham)

Redirect Examination:

By Mr. Neukom:

When I went into O'Leary's room it was at least 9:30 and we had been in there a few minutes before I noticed the stain on Mr. O'Leary's arm. The time I saw the doctor take the blood was after I had seen the stain on his arm.

Redirect examination ended.

CHARLES WILLIAM DUNN,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows: [44]

Direct Examination:

By Mr. Neukom:

I was an able seaman aboard the "Arthur R. Lewis" on the night the captain was killed. I did not hear any shots. Sometime after 9:00 o'clock, the exact time I do not know, I was ordered, along with Mr. Meacham, the boatswain, to go into O'Leary's room. Mr. Meacham followed me in. The door was shut when we arrived. I opened it and put it on the hook. The light was out but the lights shown from the passageway; that was all the light. Later one of the officers came in and cut off the light. At first, O'Leary appeared to be asleep. He was lying still, only moving his hands. He did not appear normal. He appeared like he was drunk or sick or something; he wasn't natural. He was handcuffed and I noticed a stain on one of his arms. I am not positive which arm. It was red the color of blood; I don't know whether it was blood or not, I think it was blood.

(Testimony of Charles William Dunn)

It was a smear a few inches long and maybe two inches wide. Mr. Meacham pointed it out to me before the doctor got there. When the Shore Police arrived Mr. O'Leary threatened to shoot us. He said if he could get his gun he could out-shoot any of them, and he made an effort to go down below in his bunk. I grabbed him and pushed him back in his bed. There is a drawer under the bunk. I saw O'Leary with a pistol, once on the bridge and once on deck on the voyage from Norfolk to Manus Island. He told me it was a 38 pistol, what kind I don't know. It was similar to Government's Exhibit No. 6, but I don't know whether it was that kind or not. I saw O'Leary open and close his eyes and look at me.

Direct examination ended.

Cross Examination:

By Mr. McCormick:

I was in the first mate's cabin when the doctor came in. I don't know which arm the stain was on, but it was on the forearm. The doctor used a hypodermic needle to [45] extract some blood from both arms of Mr. O'Leary. I saw him do it in O'Leary's cabin. The first time the doctor's assistant took the blood and the piece of cotton he put on to keep it from bleeding fell off on the floor and the blood ran down Mr. O'Leary's arm. After that the shore police took over and I was sent out of the room. The shore police were there when Mr. O'Leary made some mention of the fact that he could outshoot them, and one of the shore police pulled out his gun, and cocked it and threatened to shoot; that was when O'Leary reached down in his bunk. Then the shore police pulled out a gun and said if O'Leary didn't

(Testimony of Charles William Dunn)

lie down he would shoot. I threw O'Leary down. Nobody got down to look for the gun. A few minutes after we arrived in the room Zents turned the lights on. Up until then the only light was from the passageway. I had been aboard this ship all of the time between its departure and the happening of this event, and I would describe the ship very much as a happy ship. As far as I know there was no bitter feeling between any of the officers. The captain and the first mate got along very good.

Cross examination ended.

JAMES M. KENNON,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I am twenty years of age. I was the purser aboard the "Arthur R. Lewis" on December 9, 1945. This was my first voyage as a purser. It was in the nature of an apprenticeship. (Tr. 167). My quarters were on the same deck as the captain's, and they appear on Government's Exhibit No. 1 as the little enclosure marked "Clerk-Typist." My quarters were directly back of the Captain's quarters. (Tr. 167). In order to get from my quarters to the Captain's office I have to go to the opposite side of the ship [46] and head for there, and then head toward the front of the ship to the point "A" and then from point [46a] "A" to point "C" and from point "C" to point "B" (Government's Exhibit No. 1).

(Testimony of James M. Kennon)

In the vicinity of 9 o'clock I was drawing Christmas cards for the crew, and I heard a burst of bullets. The bulkhead between my quarters and the captain's bedroom look to be made of very thin plywood. There was a burst of shots, a short interval, of maybe two or three seconds and then another burst. As soon as I finished hearing the last shot, I started around the passageway, which is indicated from the point "A" (Government's Exhibit No. 1). When I was at point "A" I saw the chief mate, Francis P. O'Leary. I am not sure whether he was coming around from point "C," or he was at the head of the stairs on the same deck that I was. I don't remember speaking to him. I remember his saying "What's happened?" I am not certain—I am kind of hazy on this part of it—but I remember seeing the second mate at the bottom of the stairs on the deck just below. Then the chief mate turned around and started towards the captain's door. O'Leary turned toward point "A" and walked back toward the captain's door, which is point "B," and I followed shortly behind him and after arriving at point "B," he, either deliberately blocked the door or he fell over, I don't know which. I tried to see into the room but was unable to. We are about the same height. He then turned around, and I could see into the room. I saw the captain on the settee in his room, slumped over, with a gun at his feet. It appeared to be of a similar character to Government's Exhibit No. 6. The captain was slumped over like he had fallen. He was facing his desk, which was directly in front of the settee; he was not facing the door.

I am not certain what I did after that incident. [47] I know at some time I took the captain's pulse. Due

(Testimony of James M. Kennon)

to my excitement, I don't even know whether he had a pulse. After that I remember going back to my room and getting a mirror and placing the mirror at the captain's mouth. I did this to see if there was any indication of breath shown on the mirror. (Tr. 172.) There was a lot of confusion. The incident was known all over the ship very shortly. (Tr. 173.) After that I remember going to the chief mate's room. The room was dark and there was a form on the bed.

There were about six ladders at different locations that allowed passage from the deck I was on (bridge deck) to the deck below such as ladders on the port side and the starboard side of the forward group of cabins and one virtually in the center of the ship and other ladders (Tr. 174-175).

I was in frequent company or association with the captain in my work. He was teaching me my work. (Tr. 175.) I have seen the captain on the wing of the ship, shown on Government's Exhibit No. 1 where it is marked "W-1." I don't know on how many occasions.

When I saw Mr. O'Leary in the captain's doorway, I would judge that he was under the influence of liquor, from his walking, from following behind him. Well, by that time I was too excited. (Tr. 176).

Direct examination ended. [48]

Cross Examination:

By Mr. Samuelson:

I had been on the ship ever since its departure from Norfolk, and there wasn't any bad blood between any of the officers to my knowledge. The captain and the first mate appeared to be good friends.

(Testimony of James M. Kennon)

When I first saw Mr. O'Leary after the shooting he was going by point "C," we met at point "A," and I think he was coming around point "C," though I am not certain. After I saw him he walked toward me kind of grabbing the rail and said "What happened?" He was staggering and grabbed the rail staggering. I believe it was after I saw Mr. O'Leary that I looked down the ladder and saw Mr. Zents. I am confused on that point and I don't know that the second mate definitely was with me when the three of us walked back. I am not sure. I thought he was and I thought he was behind me. Mr. O'Leary turned and I followed and I had the feeling the second mate was there, but I wasn't paying any attention to him as we walked down the aisle from point "C" to point "B," Government's Exhibit No. 1. O'Leary was staggering and his gait was unsteady, and when we got to the door he either fell up against there or placed himself there with his arms on the doorway, and at that point I couldn't see into the room. It was my impression at that time that the second mate was on the other side of me, but I didn't notice him. After O'Leary looked into the room he turned around and staggered away, and I believe he went out through the wheelhouse.

(Rep. Tr. line 14, p. 179 to and incl. line 22.)

"Q. Did you hear him make any remark while he was standing looking into the room or not?

"A. No, sir.

"Q. You didn't hear him make any remark at that time?

"A. No, sir. [49]

(Testimony of James M. Kennon)

"Q. And you never did hear him make any statement that you can recall?

"A. I don't remember seeing him any more except when they took him off the ship."

I have told you all the conversation or remarks that I heard Mr. O'Leary make from the time I first saw him until he left the captain's cabin. When I first saw Mr. Zents which was after I saw Mr. O'Leary, Zents was at the foot of the ladder at point "A".

I was present when the shore patrol or the navy came aboard and I saw someone go into the room and wrap the gun that was at the captain's feet in a handkerchief and take it away. That gun was similar to Government's Exhibit No. 6. When I saw Mr. O'Leary I didn't see any gun in his hand. I didn't see him throw any gun into the room. The gun I saw was standing on its sights, with the trigger guard up in the air, leaning against the captain's foot.

During any of the time that I saw the first mate, I did not see any blood on him. I don't recall exactly how Mr. O'Leary was dressed, but I am quite sure he had on a pair of pants and I didn't notice anything unusual about him, so he must have been dressed. I am quite sure I would have noticed it if he had been bare above his waist-line.

As purser, I had charge of the books of the ship and the record of the supplies, and there were side-arms which were maintained for the use of the officers in case they were needed. According to the inventory that was turned in there were three guns assigned to that ship. They were kept in a file cabinet in the captain's office. I saw

(Testimony of James M. Kennon)

the one gun that was at the captain's feet, and I saw the other two guns, after the captain's body was discovered, in the drawer. I have heard they were .38s and they looked similar to Government's Exhibit No. 6.

Cross examination ended. [50]

Redirect Examination:

By Mr. Neukom:

It was quite customary for anybody to go around without a shirt aboard ship.

Redirect examination ended.

Recross Examination:

By Mr. Samuelson:

I did not at any time see Mr. Noble accompany Mr. O'Leary from the captain's cabin down to the deck below. The last time I saw Mr. O'Leary was when he left point "B" (Government's Exhibit No. 1).

Recross examination ended.

ARTHUR NOBLE,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

I was the chief engineer aboard the "Arthur Lewis", and recall the incident when Captain Fithian was killed on the evening of December 9th. Prior to finding out the captain had been killed, I had participated in some drinking of intoxicants in Mr. Hamer's room with Mr. O'Leary. I first entered Hamer's room at 6:00 o'clock,

(Testimony of Arthur Noble)

and remained there possibly half an hour. O'Leary stayed after I left and several hours later after the shooting I met him in the passageway outside of Mr. Hamer's room.

After leaving Balboa I saw O'Leary with a pistol similar to Government's Exhibit No. 6. I had almost daily seen the captain at the point marked "W-1" on Government's Exhibit No. 1, that is about 30 feet from the door of the captain's offices. The night of December 9th was a warm summer evening. It was a habit for the men to wear just their undershirts. I was sitting on the deck outside my own quarters talking to the steward when I heard the firing of a gun. My quarters are indicated on Government's Exhibit No. 2, [51] where it is marked "Ch. eng. office" and "Chief Engineer, S. R." that is on the deck immediately below the captain's quarters. I heard two bursts of fire, the first one sounded like four shots. The second, I am not certain of it, but it sounded like more than two. I jumped up, walked through the passageway across the deckhouse, from the port side toward the starboard side. I did not see anyone, and sat down again. Within a minute or two the purser came to me and said the captain had been shot. I followed him up the ladder to the port of the bridge, and through the wheelhouse and to the door of the captain's offices. I looked in and saw the body lying there. I am not clear as to what I did then, but to the best of my recollection I went down on the lower deck. I saw O'Leary in the starboard passageway at a point I have marked "Z-1", which is in the passageway directly outside of the door of the cabin referred to as

(Testimony of Arthur Noble)

"2 Cadets", Government's Exhibit No. 2. I presume he was going from his room, and I merely passed him, and we were facing each other. When I passed Mr. O'Leary, I said "My God, Frank, haven't you done enough harm already?" I do not recall his making any reply at all. I called him Frank. I wouldn't pass an opinion on his condition at that particular time, because I did not see him in motion, nor do I recall his speaking, but about an hour and a half before that I would say that he was drunk. At the time I saw him everybody was confused, including myself. Later that night I saw Mr. O'Leary when Zents and I went down to put the handcuffs on him. I went back to the captain's cabin later and he appeared to be dead. "Captain's office was about 11 x 8 feet in dimension. The passageways were not over 3 feet wide and the other cabins were relatively of the same size." (Tr. 199.) I saw a bullet wound in his shoulder, but there was no blood from that. There was blood on his hand, and I believe some on the deck immediately in front of him.

Direct examination ended. [52]

Cross Examination:

By Mr. McCormick:

The chief engineer ranks with, but after the captain. The wing of the bridge deck at which point I had seen the captain was the nearest part of the bridge to his quarters, but the ship was operated from the deck above.

At the time I observed the captain dead in his cabin, I think he had on pajamas, at least the lower part of the pajamas; he was nude to the waist. I observed the bed

(Testimony of Arthur Noble)

and it was mussed up, there is no question in my mind about that.

While we were drinking earlier in the evening, the radio operator was in and out. I think he took a drink. The drinking was in the third mate's cabin. Present there was the first assistant engineer, second assistant engineer, first mate, third mate, and I believe the second mate was in there part of the time. I took two drinks while I was in there. They were tumblers, water glasses, about one ounce each. I did not have enough drinks to feel the effects of it. Before dinner I had two drinks; I did not feel the effects of them.

The first assistant engineer's name is Berge (erroneously spelled throughout transcript "Berg"). We call him Aspirin. Mr. Berge had some drinks with us in the third mate's room. He was sober enough for me to order him to go down below when trouble developed. We suggested to the Second Assistant Engineer that he go to the captain's quarters and see if the captain would have a drink with us, and he came back and reported that the captain was asleep. There is no question in my mind about that.

I had seen the captain on the bridge a number of times in his pajamas.

The first time that I went to O'Leary's cabin with Zents was when I went down to put the handcuffs on him. I saw O'Leary at that time in his bunk. I did not see any blood on [53] his person.

On the ship that night I did not see anybody under the influence to the extent that I felt O'Leary was. When I went into the third mate's quarters, there was one pint

(Testimony of Arthur Noble)

bottle less than half full. I don't know how many people had drinks out of that bottle. They poured me a drink immediately. O'Leary went back to his room [53a] and came back with a full pint of whiskey. When he left that was not nearly empty.

Government's Exhibit No. 7, which is a photograph, fairly represents the appearance of the captain's quarters when I observed him lying there apparently dead. There was not as much blood on the settee when I observed the captain as is shown in the photograph. There were blood stains on the floor around his feet when I first went in. There seemed to be very little blood dripping when I felt his pulse.

I observed O'Leary shooting birds on the trip, and judging from what I saw he was a very poor shot.

I ordered the third assistant engineer off duty that night because he was drinking excessively, that was Mr. Cooper; that was several hours later. I had not seen him from supper time until just prior to the shooting which was several hours later. He was another individual aboard the ship who was in such condition that I did not think he was capable of carrying out his duties. Mr. Berge was one of my subordinates. We was not on duty that night.

I took a voyage report up to the captain's quarters that evening about 7:30 in the evening. I put it on the captain's desk, in his office, and I assumed the captain was

(Testimony of Arthur Noble)

asleep because his quarters were dark, but I could not have seen him in his bunk because his quarters were dark. That paper was still lying on the desk when the Naval investigators came aboard.

I had never seen any guns aboard the ship until the night of the shooting and that night I can only say that I saw one. There might have been two. I do remember one gun there and another holster. I don't know if there was a gun in it. I saw one on the floor later when I took the captain's pulse and observed the Naval officers or the Shore Police wrap it in a handkerchief and take it into their possession.

Cross examination ended. [54]

Redirect Examination:

By Mr. Neukom:

I was present when Government's Exhibit No. 7 (photograph) was taken, and it was a considerable time, hours after the shooting. I believe this picture—Government's Exhibit No. 7— was taken the following day. I was present when it was taken. When I first saw the captain, apparently dead, there was then not the amount of blood on the deck or the floor as is reflected in the picture. His hands were bloody. The additional blood is explained by reason of the fact that when the medical examiner came aboard they laid the captain's body out on the settee and his arms were hanging over the side and the hospital corps men drew blood from one of his arms and then I observed the body was quite bloody.

Redirect examination ended.

ASBJORN BERGE,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination:

By Mr. Neukom:

My name is Asbjorn Berge, and I was one of the officers aboard the "Arthur Lewis" on December 9, 1945. I was present at supper when the skipper was eating and he was sober. I was in Mr. Hamer's room when the officers were having some drinks. Zents, Cooper and O'Leary were there. I left when Hamer said he was going to sleep. We had two or three "shots" apiece in there. I was down in the engine room and didn't hear the shots. Later I went into O'Leary's room with Noble and Zents and I put the handcuffs on him. While I was in there no one said anything to Mr. O'Leary. Later a Mr. Regan, or a Lieutenant Commander came into the room. I spoke to O'Leary about shooting the captain. I asked him why he shot the captain. He didn't answer. He appeared to be awake. He had a kind of funny look in his eye. Commander Regan and the [55] boatswain Meacham and Dunn, I think, were there, because they were guarding him.

Direct examination ended. [55a]

Cross Examination:

By Mr. Samuelson:

I had four or five drinks altogether that night and I was feeling pretty high. I was talking too much for my own good. I didn't see any blood on O'Leary that night. It was a very good ship. I said to O'Leary, "Why did

(Testimony of Asbjorn Berge)

you shoot the old man", or, "The captain", or words to that effect. He didn't say anything.

I remember testifying in the commissioner's hearing in this court about the 29th or 30th of January, and I testified as follows (Rep. Tr. p. 228, lines 14 through 23):

"Q. (Reading) 'Q. Did you reply to him?

'A. Well, I asked him why he shot the old man.'

"And the question then was asked you, 'And did he reply to that'?

"And you answered, 'Did I shoot him'? he said, and he had sort of a far-away look on his face when he did so.'

"Do you remember that?

"A. That was up in the guardhouse in Manus that he answered."

Mr. O'Leary was drunk that night in his room and when people would say things to him he would mimic them and say them right back. He did that with several questions and several answers, and when Dunn or I would say something to him he would repeat it in a drunken manner.

I cannot recall if he answered me in his cabin or not. I know there was one time I put the question to O'Leary if he answered that time I don't recall; he said something but it didn't make sense you know. My memory is refreshed and I remember testifying as follows at the commissioner's hearing (Rep. Tr. p. 230, l. 18—p. 231 through l. 25):

"The second mate then in the meantime came with the handcuffs, and I saw him put them on O'Leary.'

"A. Yes.

(Testimony of Asbjorn Berge)

"Q. (Continuing reading) 'A. As I understand it now, you [56] went into the mate's room?

" 'A. Together with the chief engineer and the second mate.

" 'Q. And at that time he had already been placed in handcuffs?'

" 'And your answer was, 'No, they placed him in handcuffs.'

" 'A. That's right.

"Q. (Continuing reading) 'Q. They placed him in handcuffs at that time?

" 'A. Yes.

" 'Q. Was there any conversation between the chief mate and the second mate or between you and the chief mate?

" 'A. No, not as far as I recall.

" 'Do you recall the chief mate having asked any questions at that time?

" 'A. No.

" 'Q. To refresh your memory, didn't the chief mate say to either you or to the second mate, "What is the matter?" or something like that?

" 'A. Yes, something like that, "What is the matter?" That is right. That is all he said.

" 'Q. Did you reply to him?

" 'A. Well, I asked him why he shot the old man.

" 'Q. And did he reply to that?

" 'A. "Did I shoot him?" he said, and he had sort of a far-away look on his face when he did so.

(Testimony of Asbjorn Berge)

“Q. Do you know whether or not the chief mate was intoxicated at the time he made that statement?

“A. Oh, yes, he must have been.’

“A. That is right.”

That conversation all took place in O’Leary’s cabin.

Cross examination ended. [57]

Redirect Examination:

By Mr. Neukom:

I also talked to O’Leary at a later time within a few hours after that. They took O’Leary and me ashore up in Manus, and I placed him in the guardhouse there. He was sitting beside me, and I asked him the same question and he said the same thing to the same effect, “Did I shoot him?”

Redirect examination ended.

HARRY MAXWELL ZENTS,

a Government witness, was recalled for further cross examination by the counsel for defendant, and testified as follows:

Recross Examination:

By Mr. McCormick:

I do not suffer from fits of any kind. There have been no occasions when I suffered from epilepsy. I do not recall Commissioner Head asking me to come back to the witness stand for a few minutes at the Commissioner’s hearing. My answer to whether or not I testified as follows (Rep. Tr. p. 234, l. 20 through line 1, p. 235):

“Q. Did you have any physical trouble on that ship?

“A. Myself personally?

(Testimony of Harry Maxwell Zents)

"Q. Yes.

"A. Yes.

"Q. What was the nature of that?

"A. Epileptic fits."

is no because at that time my case wasn't diagnosed. By my answer I mean just what I say; there was no doctor that had given me any definite statement of it. I hadn't been examined.

Recross examination ended.

Redirect Examination:

By Mr. Neukom:

Since the Commissioner's hearing I have been to a physician about my condition. His name is Dr. Roman, a psychiatrist in the [58] Marine Hospital, San Francisco. He says I did not have epileptic fits, and he has released me for service. He told me I needed a rest. My mind has not been clouded since my troubles.

Redirect examination ended.

The above being all of the evidence offered and received at the trial of the cause, the following proceedings took place.

Mr. Neukom, Counsel for the Government, called it to the attention of the Court that copies of Government's Exhibits No. 1 and No. 2 had been referred to during the trial and the jurors had been permitted to view them. Mr. McCormick, Counsel for the defense, stated that the defense had no objection to that procedure.

Thereupon, it was stipulated between Counsel for the Government and Counsel for the defense that the Government had at the time of the trial the trousers and shirt of the defendant in its, the Government's possession, which said articles of clothing were on defendant at the time of the crime, and said articles of clothing did not possess any blood stains.

Thereafter, Government's Exhibit No. 11, previously marked for identification, being a blue print of the ship "Arthur R. Lewis", displaying the deck thereof, was received in evidence; also Government's Exhibits No. 1 and No. 2 were offered and received in evidence.

Thereafter, the following proceeding took place:

Mr. McCormick, Counsel for defense, orally moved the Court to instruct the jury to find the defendant not guilty on the grounds that the evidence offered was insufficient to sustain a verdict or judgment of guilt. He stated that, considering the evidence offered as a whole, but one reasonable view could be taken thereof, and the conclusions to be drawn [59] therefrom and such view failed to meet the requirements that it excluded every other reasonable hypothesis but that of guilty, and further that all of the evidence and the conclusions that could be drawn therefrom was as consistent with the innocence of the defendant as with his guilt.

Arguments on the motion were offered by Counsel for both sides and the matter submitted to the Court for its decision. Whereupon, the Court denied the motion, stat-

ing that although the case was not a strong one, the Court felt that the evidence presented a question of fact for the jury to determine.

An exception to the ruling of the Court on defendant's motion was requested by Counsel for the defendant and allowed by the Court.

Thereafter, the defendant rested, and defendant's Counsel renewed his motion to instruct the jury to find the defendant not guilty. Said motion was submitted on the argument theretofore made, and upon being submitted to the Court was denied.

After arguments by Counsel, the Court proceeded to instruct the jury on the law of the case and the matter was submitted to them. After deliberation, the jury returned its unanimous verdict, finding the defendant guilty of the crime of voluntary manslaughter.

The within document, consisting of Sixty (60) pages, comprises all of the evidence offered and received, and all other proceedings in the trial of the case of United States of America, Plaintiff vs. Francis P. O'Leary, Defendant.

Dated: Los Angeles, California, May 29, 1946.

A. I. McCORMICK and
PAT A. McCORMICK

By A. I. McCormick
Counsel for Defendant, Francis P. O'Leary

Received copy of the within this 29 day of May, 1946.
U. S. Atty., by Norman W. Neukom, Asst. U. S. Atty.

[Endorsed]: Filed May 29, 1946. [60]

[Title of District Court and Cause.]

STIPULATION AS TO STATEMENT OF PROCEEDINGS AT THE TRIAL, INCLUDING ALL OF THE EVIDENCE OFFERED OR RECEIVED

It Is Hereby Stipulated that the foregoing statement of "Proceedings at the Trial, Including All of the Evidence Offered or Received" is a full, true and correct statement of all of the proceedings had at the trial of the above entitled case, and includes, among other things, all of the evidence offered and all of the evidence received in said cause, and that the same may be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, June 7th, 1946.

CHARLES H. CARR

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney

Attorneys for Plaintiff and Respondent,
United States of America

A. I. McCORMICK and

PAT A. McCORMICK

By A. I. McCormick

Attorneys for Defendant and Appellant,
Francis P. O'Leary

ORDER APPROVING ABOVE STATEMENT

The foregoing statement of proceedings at the trial, including all evidence offered or received is hereby approved.

Dated: Los Angeles, California, June 10th, 1946.

LEON R. YANKWICH

U. S. District Judge

[Endorsed]: Filed Jun. 10, 1946.

[Endorsed]: No. 11295. In the United States Circuit Court of Appeals for the Ninth Circuit. Francis P. O'Leary, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 13, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11295

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S STATEMENT OF POINTS TO BE
RELIED UPON AND DESIGNATION OF THE
RECORD TO BE PRINTED

Comes now the Appellant, Francis P. O'Leary, and hereby adopts the statement of points on which Appellant intends to rely on the appeal, filed with the Clerk of the Trial Court, and set forth in full in the record certified herein by the Clerk of the district Court of the United States, for the Southern District of California, Central Division, commencing at page Thirty-six (36) of the certified record on appeal herein. Appellant intends to rely in this Court of Appeals on the points set forth in said statement and on all of said points.

Appellant further states that, except as to certain exhibits introduced in evidence, as hereinafter referred to, he believes and considers that the entire record as certified by the Trial Court is necessary for consideration of the points upon which said Appellant intends to rely in

this Court, and he desires to have said entire record printed herein.

As to the exhibits introduced in evidence, Appellant files herewith a written stipulation of the parties hereto to the effect that, of said exhibits, only Government's Exhibit No. 1 and Government's Exhibit No. 2 need be printed in the printed record, and that the other original exhibits, as certified to and filed with this Court, may be referred to, used and considered by the Court and Counsel on the hearing and determination of this appeal.

Appellant requests that an order be made and entered by this Court in accordance with said stipulation.

Dated: Los Angeles, California, this 11 day of June, 1946.

A. I. McCORMICK and
PAT A. McCORMICK

By A. I. McCormick

Attorneys for Appellant, Francis P. O'Leary

Received copy of the within Points this 11 day of June, 1946. U. S. Atty., by Norman W. Neukom, Asst., Attorney for Respt.

[Endorsed]: Filed Jun. 13, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO PRINTING OF EXHIBITS

It Is Hereby Stipulated by and between the parties to the above entitled cause on appeal, through and by their respective attorneys, that all of the exhibits referred to and certified in the record on appeal by the Clerk of the District Court of the United States, for the Southern District of California, Central Division, only Government's Exhibit No. 1 and Government's Exhibit No. 2 need be printed in the printed transcript of the record on appeal.

It Is Further Stipulated that each and all of the other original exhibits referred to in the record so certified by the Clerk of said District Court may be referred to, examined and considered by said Circuit Court of Appeals, and the Judges thereof, in the hearing and determination of said cause on appeal, and also by the attorneys for the respective parties in their briefs and arguments herein without the necessity of printing said named original exhibits in the printed record.

Dated: Los Angeles, California, this 11th day of June, 1946.

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Chief Assistant U. S. Attorney

ERNEST J. TOLIN

Assistant U. S. Attorney

By Norman W. Neukom

Assistant U. S. Attorney

Attorneys for Respondent, United States of
America

A. I. McCORMICK and

PAT A. McCORMICK

By A. I. McCormick

Attorneys for Appellant, Francis P. O'Leary

ORDER

It Is So Ordered.

This 14th day of June, 1946.

FRANCIS A. GARRECHT

Judge of the United States Circuit Court of
Appeals[Endorsed]: Filed Jun. 14, 1946. Paul P. O'Brien,
Clerk.